Employee Benefit Plans

Explanation No. 5A

Coverage and Nondiscrimination Requirement

Defined Benefits Plans

The Service's review of a determination letter application for a plan will not consider, and a determination letter may not be relied on with respect to, whether the plan satisfies the requirements of section 401(a)(4) (except as provided below), 401(a)(26), or 410(b). This change is effective for applications filed on or after February 1, 2012, in the case of plans under a 5-year remedial amendment cycle (other than terminating plans), and May 1, 2012 in the case of terminating plans and plans under a 6-year remedial amendment cycle. See, Announcement 2011-82, 2011-52 I.R.B. 1052.

As of the effective date of this change with respect to a plan, Schedule Q (Form 5300) and accompanying demonstrations regarding the coverage and nondiscrimination requirements should not be submitted with any determination letter application for the plan.

The Service will continue to determine whether a plan's benefit or contribution formula satisfies the requirements of a nondiscriminatory design-based safe harbor and will also continue to determine whether a plan's terms satisfy sections 401(k) and 401(m).

The Alert Guidelines will be revised in the future to reflect these changes.

This publication contains copies of:
Form 9638, Worksheet 5A
Form 9640, Deficiency Checksheet 5A

These forms are included as examples only and should not be completed and returned to the Internal Revenue Service

Purpose of worksheet 5A - identify major problems in coverage and nondiscrimination

The purpose of Form 9638, Worksheet Number 5A, is to identify major problems in defined benefit plans relating to the minimum coverage and nondiscrimination requirements of the Code and associated requirements.

These include the requirements of

1) Sections 401(a)(4) and 410(b) of the Code,

2) the minimum participation requirements of sections 401(a)(26), and

3) the nondiscriminatory compensation requirements of section 414(s).

This worksheet also addresses certain requirements of the qualified separate lines of business rules of section 414(r) of the Code. Certain related requirements, such as the limitation on compensation under section 401(a)(17) of the Code, are addressed in other worksheets.

Use worksheet 5B for permitted disparity

If the plan is intended to satisfy the nondiscrimination in amount requirement under section 401(a)(4) as a design-based safe harbor plan and the plan provides for permitted disparity, Worksheet Number 5B may be used to determine whether the disparity satisfies the requirements of section 401(l) of the Code.

Use Explantion 5C for general test or average benefits test

Explanation Number 5C should also be used in reviewing a plan where the employer has requested a determination that the plan satisfies the nondiscrimination in amount requirement by satisfying a general test or where the plan is intended to satisfy the minimum coverage requirements by satisfying the average benefit test.

IRS

The technical principles in this publication may be changed by future regulations or guidelines.

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

General Guidelines

Although this worksheet relates to defined benefit plans, certain requirements that pertain primarily, or solely, to defined contribution plans are also discussed in the explanations.

Generally, a Yes answer to a question on the worksheet indicates a favorable conclusion while a No answer signals a problem concerning plan qualification. This rule may be altered by specific instructions for a given question. Please explain any No answer in the space provided on the worksheet.

References at the end of each paragraph in the explanation are to the Internal Revenue Code and the Income Tax Regulations unless otherwise noted.

The technical principles in this publication may be changed by future regulations or guidelines.

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Part I: General Requirements

Purpose and scope of Schedule Q

Purpose of Schedule Q

Determination letter applicants may include with their applications Schedule Q – Elective Determination Requests (Form 5300) which relates to the manner in which the applicant's plan satisfies certain qualification requirements relating to minimum participation, coverage and nondiscrimination (in the form of demonstrations). This schedule allows the applicant to indicate whether they wish certain of these requirements to be considered by the IRS in the review of its application.

Scope of Schedule Q

The use of Schedule Q is optional with all applications, including applications filed on Form 5300, Form 5307 (for M&P, regional prototype, and volume submitter plans) or Form 5310 (for terminating plans). Schedule Q is not to be used for state and local government plans or for certain plan amendments filed on Form 6406 that do not involve a significant change to plan benefits or coverage.

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part II. Qualified Separate Lines of Business (QSLOB)

Introduction

Coverage and nondiscrimination requirements apply to employees of each qualified separate line of business ("QSLOB")

Section 414(r) of the Code and the regulations thereunder prescribe conditions under which an employer is treated as operating qualified separate lines of business (QSLOBs).

If an employer (determined in accordance with the provisions of section 414(b), (c), (m), and (o)) is treated as operating QSLOBs, the

1) minimum coverage requirements of section 410(b),

2) the nondiscrimination requirements of section 401(a)(4), and

3) the minimum participation requirements of section 401(a)(26)

may be applied separately with respect to the employees of each QSLOB. That is, the employees of each QSLOB are treated as if they were the only employees of the employer.

Disaggregate plan if plan benefits employees of more than one QSLOB

Additionally, if a plan benefits the employees of more than one QSLOB, the plan is disaggregated into two or more separate disaggregated plans (one for each QSLOB that has employees in the plan), and in testing each separate disaggregated plan for compliance with the coverage and nondiscrimination requirements or the minimum participation requirements, the employees of the other QSLOBs are treated as excludable employees and are thus disregarded.

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Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Introduction, Continued

Employer must apply QSLOB to all employees and plans	In general, if the employer is applying the minimum coverage and nondiscrimination requirements separately with respect to the employees of a QSLOB, it must do so with respect to all its plans, employees, and QSLOBs.
QSLOB and minimum participation under 401(a)(26)	The same all-or-nothing rule applies in the case of the minimum participation requirements of section 401(a)(26). (In both cases, there is an exception, discussed in line c.) However, the fact that the employer is using the QSLOB rules for purposes of sections 410(b) and 401(a)(4) does not require the use of these rules for purposes of section 401(a)(26), or vice versa. In fact, for purposes of satisfying the requirements of section 401(a)(26) on a QSLOB basis, the general requirement under section 414(r) that a line of business have at least 50 employees does not apply.
QSLOB rules apply on a year-by-year basis	This is a year by year issue. That is, for any given testing year (i.e., calendar year), the employer may decide whether or not to treat itself as operating QSLOBs. Whatever the choice, it will generally apply to all plans of the employer for plan years that begin in the testing year.
Overview Cites	**414 (r), 1.414 (r) -0 through 11**
Employer may request a QSLOB determination and include demonstration	When an employer files a determination letter request for a plan, the employer may request a determination on whether the plan satisfies the applicable QSLOB rules. The employer must then include a demonstration (which should be labeled Demo 1) that identifies each QSLOB that has employees benefiting under the plan and the section(s) of the Code for which it is testing on a QSLOB basis (i.e., 410 (b) and 401 (a) (4) or 401 (a) (26)).

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Election to be operated as QSLOB is made by employer

The determination of whether an employer is treated as operating QSLOBs is generally to be made by the employer. That is, employers may not rely on favorable determination letters issued for plans as evidence that they are entitled to be treated as operating QSLOBs and specialists should not seek to determine that the requirements of section 414(r) have been satisfied, except as described below.

"Administrative scrutiny" determination is filed with National Office -- certain procedures

In some situations, employers may request a determination from the National Office that a QSLOB satisfies a requirement of the regulations that is called the "administrative scrutiny" requirement.

An employer that has a request for an administrative scrutiny determination pending with the National Office when it files a determination letter application is to attach a copy of National Office's confirmation receipt to its application. In this case, the specialist should contact the National Office regarding the status of the administrative scrutiny determination before issuing a determination letter for the plan.

Cites **414 (r), 1. 414 (r)-1,8, and 9, Rev. Proc. 98-6, Schedule Q**

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Line A – "Gateway" Requirement

Introduction- each QSLOB must satisfy coverage

If the employer has indicated that it is treating itself as operating QSLOBs for purposes of the minimum coverage requirements of section 410(b), then it is required to apply the minimum coverage requirements and nondiscrimination requirements separately to the employees of each QSLOB in testing whether all plans of the employer meet the coverage requirements. (An exception is discussed in line c.)

Two overall requirements to satisfy coverage for QSLOBs- "gateway" and coverage must be satisfied for each QSLOB

In this case, the plan will satisfy the minimum coverage requirements only if:

(a) the plan benefits a classification of employees that is nondiscriminatory on an employer-wide basis and

(b) the plan satisfies the minimum coverage requirements on a QSLOB basis.

Thus, in addition to having to satisfy coverage on a QSLOB basis, the plan must first pass a nondiscriminatory classification "gateway" on an employer-wide basis.

The coverage requirements are discussed in general in Part V of the worksheet. Complete Part V to determine if the plan satisfies coverage on a QSLOB basis.

Demo 1 must include illustration of gateway requirement

An employer that is using the QSLOB rules for purposes of coverage and nondiscrimination must include in Demo 1 a demonstration that the plan meets the gateway nondiscriminatory classification requirement.

Satisfying the gateway test

This requirement is satisfied if the demonstration shows that either

(a) the plan satisfies the ratio percentage test, or

(b) the plan satisfies the nondiscriminatory classification test.

(See Part V for definitions of these terms.)

Continued on next page

Line A – "Gateway" Requirement, Continued

Each disaggregated plan must satisfy coverage

Under the coverage rules, a plan that benefits the employees of more than one QSLOB is disaggregated and treated as consisting of separate plans for each QSLOB. In this case, the coverage requirements, including the gateway test, must be satisfied separately by each disaggregated plan.

Gateway test includes all employees

The gateway test is performed on an employer-wide basis. Therefore, in making the demonstration the employer may not treat employees as excludable merely because they are in separate QSLOBs.

That is, all employees of the employer who are not otherwise excludable are counted as nonexcludable employees for purposes of the gateway test, regardless of QSLOB.

For disaggregated plans, only certain employees benefit

However, because plans that benefit employees of more than one QSLOB are disaggregated, in testing a plan with respect to the employees of one QSLOB, the employees of other QSLOBs are not treated as benefiting even though they may not be treated as excludable.

For certain tests, groups of employees must satisfy coverage

Certain nondiscrimination rules under section 401(a)(4) require that a group of employees under the plan satisfy section 410(b) in order to satisfy section 401(a)(4). For example, the general tests for nondiscrimination in amount require each rate group under the plan to satisfy section 410(b).

Also, a benefit, right, or feature will satisfy the current availability requirement only if it is currently available to a group of employees that satisfies section 410(b). (See Part V.)

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Plan can be restructured into component plans

Likewise, in order to satisfy section 401(a)(4), a plan may be restructured into component plans provided each component plan would satisfy sections 401(a)(4) and 410(b) as if it were a separate plan. (See Part IV.)

Component plans and the QSLOB requirements

If the employer is using the QSLOB rules for coverage and nondiscrimination, then in applying these nondiscrimination requirements, section 410(b) is to be applied in the same manner as it is applied for purposes of the coverage requirements. That is, the applicable group of employees must satisfy the gateway test on an employer-wide basis and must also satisfy section 410(b) on a QSLOB basis, in both cases as if the applicable group of employees were the only employees benefiting under the plan.

Example -- benefit, right, and feature, gateway and QSLOB must be satisfied for the group

For example, if the employer is demonstrating that a benefit, right, or feature satisfies current availability and the employer is using the QSLOB rules for purposes of coverage and nondiscrimination, the employer must generally show that the group of employees to whom the benefit, right, or feature is currently available satisfies the gateway test on an employer-wide basis and section 410(b) on a QSLOB basis, in both cases as if the group of employees to whom the benefit, right, or feature is currently available were the only employees benefiting under the plan.

For gateway test, ratio percentage can be above unsafe harbor without needing to apply facts and circumstances

If the employer is demonstrating the gateway test by showing that the plan meets the nondiscriminatory classification test and the ratio percentage falls between the safe and unsafe harbor percentages, the gateway test is satisfied.

It is not necessary in this case to look at the facts and circumstances (as would otherwise be required by the nondiscriminatory classification test) because satisfaction of the requirements of section 414(r) is treated as satisfaction of the facts and circumstances requirement.

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Line A – "Gateway" Requirement, Continued

Modification to unsafe harbor % if ratio % on a QSLOB basis is at least 90%

In certain circumstances, the employer may reduce the unsafe harbor percentage in the nondiscriminatory classification requirement by five percentage points. In these circumstances, the 20 percent floor on unsafe harbors is also eliminated.

These modifications are allowed if the demonstration shows that the ratio percentage for the plan **on a QSLOB basis** is at least 90 percent. Where the nondiscrimination rules require a group of employees to satisfy section 410(b), as described above, the ratio percentage determined in applying the nondiscrimination rule (on a QSLOB basis) must also be at least 90 percent in order for these modifications to be allowed in applying the gateway test.

For example, if the employer is demonstrating that the plan satisfies a general test, these modifications in applying the gateway test may not be made unless the ratio percentage for each rate group under the plan is at least 90 percent.

If ratio % is below unsafe harbor %- Commissioner discretion

If a plan would satisfy the preceding paragraph, except that the ratio percentage on an employer-wide basis would still be below the reduced unsafe harbor percentage, it will nevertheless be deemed to satisfy the gateway test if the Commissioner determines, on the basis of all the relevant facts and circumstances, that the plan's classification is not discriminatory.

Line B: Cite **1 . 414 (r) -8**

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QSLOB, Line B – Special (Employer-wide) Rule

Apply QSLOB rules on an employer-wide basis

An employer that treats itself as operating QSLOBs for purposes of the coverage and nondiscrimination requirements may apply these requirements to a plan on an employer-wide rather than QSLOB basis if the plan benefits at least 70 percent of the employer's nonexcludable nonhighly compensated employees.

Where the nondiscrimination rules require a group of employees under the plan to satisfy section 410(b), as described above, the group of employees must also satisfy the 70 percent test on an employer-wide basis. For this purpose, the plan is not disaggregated on the basis of different QSLOBs.

If the employer is applying this employer-wide rule to a plan for purposes of coverage and nondiscrimination, it may also use it for purposes of minimum participation for the same plan.

Employers using this rule are required to include with Demo 1 a demonstration that they satisfy its requirement.

1. 414(r) -1(c)(2)(ii), 1. 414(r)-1(c)(3)(ii)

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Part III – Additional Participation Requirements

Section 401(a)(26)-requirement and scope

Introduction

Section 401(a)(26) requires a qualified defined benefit plan to meet certain minimum participation requirements.

- A defined benefit plan must satisfy section 401(a)(26) with respect to active employees.
- A defined benefit plan that provides additional accruals during the plan year to former employees must also satisfy section 401(a)(26) with respect to former employees.
- Finally, defined benefit plans must satisfy section 401(a)(26) with respect to the plan's prior benefit structure.

Determination letter application

A determination letter application for a defined benefit plan will be reviewed for compliance with section 401(a)(26) if the application requests consideration of section 410(b), or if a cover letter requests consideration of section 401(a)(26) and the applicant provides data supporting the request. This demonstration should be identified as Demo 2.

1.401(a)(26)-1(a), 1.401(a)(26)-8

Testing minimum participation for one day of the year

The minimum participation requirements are generally required to be met on each day of the plan year. However, a plan is treated as satisfying the minimum participation requirements for a plan year if it satisfies such requirements on one day of the year, provided that day is reasonably representative of the employer's workforce and the plan's coverage.

Retroactive amendment if plan fails minimum participation requirement

A plan that fails the minimum participation requirements for the plan year may be retroactively amended by the 15th day of the 10th month following such year to satisfy section 401(a)(26) by, for example, expanding coverage. Plans that are merged by the end of this period will not fail section 401(a)(26) merely because they failed to satisfy section 401(a)(26) prior to the merger.

1.401(a)(26)-7

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QSLOB, Line B – Special (Employer-wide) Rule, Continued

Plans not benefiting HCEs is deemed to satisfy 401(a)(26)

A plan is deemed to satisfy section 401(a)(26) for a plan year if it is neither top-heavy nor frozen and it meets both of the following requirements:

1. The plan benefits no highly compensated employee (HCE) or highly compensated former employee.

2. The plan is not aggregated with any other plan to satisfy section 401(a)(4) or section 410(b) (other than the average benefits percentage test).

1.401(a)(26)-1(b)(1)

Underfunded DB plans deemed to satisfy 401(a)(26) if certain conditions are met

An underfunded defined benefit plan is also deemed to satisfy section 401(a)(26) if the following requirements are met:

1. A timely filed actuarial report, as required by section 6059, shows that the plan does not have sufficient assets to satisfy all liabilities under the plan.

2. For the plan year, no employees or former employees accrue additional benefits under the plan except for top-heavy minimum benefits for non-key employees required by section 416.

3. For years beginning on or after January 1, 1992, the plan is subject to Title IV of ERISA or is not top-heavy.

1. 401(a)(26)-1(b)(3)

Defining a plan, and each QSLOB must separately satisfy 401(a)(26)

For purposes of section 401(a)(26), each single plan within the meaning of section 414(l) is a separate plan.

A plan that benefits the employees of more than one QSLOB is disaggregated and each separate disaggregated plan must separately satisfy section 401(a)(26).

1.401(a)(26)-2(c) and (d)

Continued on next page

QSLOB, Line B – Special (Employer-wide) Rule, Continued

Employer can elect to treat collectively bargained employees as separate plan

An employer may also elect to treat the portion of a plan that benefits employees who are included in a unit of employees covered by a collective bargaining agreement and the portion of a plan that benefits employees who are not included in such a collective bargaining unit as separate plans for purposes of section 401(a)(26). (This rule may be applied separately to each collective bargaining agreement.)

The employer should demonstrate that each such separate plan independently satisfies the requirements of section 401(a)(26).

Exception to election if more than 2% are professional employees

Note that if more than 2 percent of the employees who are covered pursuant to a collective bargaining agreement are professional employees, all employees covered under such collective bargaining agreement are treated as non-collective bargaining unit employees.

1.401(a)(26)-6(b)(4) and (5)

Collectively bargained employees deemed to satisfy 401(a)(26), except for professional employees

The portion of a multiemployer plan that benefits employees included in a unit of employees covered by a collective bargaining agreement may be treated as a separate plan and is deemed to satisfy the section 401(a)(26) participation requirements.

This exception does not apply with respect to a collective bargaining agreement if more than 2 percent of the employees who are covered pursuant to such agreement are professional employees. Such participants are tested as non-collective bargaining unit employees.

Non-collectively bargained employees must satisfy 401(a)(26)

Any non-collective bargaining unit employees benefiting under a multiemployer plan must be tested as if they benefit under a non-collectively bargained plan.

The applicant must demonstrate that the part of the plan benefiting non-collective bargaining unit employees separately satisfies the requirements of section 401(a)(26) solely by reference to each employer's employees.

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QSLOB, Line B – Special (Employer-wide) Rule, Continued

Special testing rule if total number of employees is 50 or more

However, a special testing rule provides that a multiemployer plan that includes non-collective bargaining unit employees will satisfy section 401(a)(26) if the total number of collective bargaining unit and non-collective bargaining unit employees benefiting under the plan is 50 or more.

In this case, separate testing of the non-collective bargaining unit employees is not necessary.

Multiemployer plan - Cites

1.401(a)(26)-1(b)(2), 1.401(a)(26)-2(d)(1)(ii)

Disaggregation within multiple employer plan

A multiple employer plan is treated as comprising separate plans each of which is maintained by the separate employers. The applicant must demonstrate that each separate plan separately satisfies section 401(a)(26) by reference only to each employer's employees.

1.401(a)(26)-2(d)(1)(ii)

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Line A – Minimum participation requirement

401(a)(26) statutory requirement

If the plan does not automatically satisfy section 401(a)(26), it must benefit at least the lesser of:

1) 50 employees of the employer, **OR**

2) the greater of:

a) 40 percent of all employees of the employer, or

b) 2 employees (or if there is only 1 employee, such employee).

Frozen plan satisfies 401(a)(26) -- except for prior benefit structure

A frozen defined benefit plan (i.e., one that provides no additional benefit accruals, other than minimum benefit accruals for nonkey employees required by section 416) also automatically satisfies this requirement (as well as the application of section 401(a)(26) to former employees) and need only satisfy section 401(a)(26) with respect to its prior benefit structure.

Definition of employer

The definition of employer includes all related employers under section 414(b), (c) or (m).

Note that most section 401(a)(26) definitions are found in the section 410(b) regulations

Cites – general rule and frozen plans

1.401(a)(26)-2(a) and (b), 1. 401(a)(26)-8

Excludable Employees defined

In performing the participation tests, the employees who are excludable are generally the same as those who are excludable for the purposes of performing the coverage tests.

See Part V of the worksheet.

1.401(a)(26)-6

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Line A – Minimum participation requirement, Continued

Employees subject to CBA may be excludable for purposes of testing non-C.B. employees

However, employees covered under a collective bargaining agreement may, at the option of the employer, be treated as excludable employees for the purposes of testing the portion of the plan that benefits non-collective bargaining unit employees. (This rule may be applied separately to each collective bargaining agreement.)

Similarly, non-collective bargaining unit employees may, at the election of the employer, be treated as excludable employees for the purposes of testing the portion of the plan that benefits only collective bargaining unit employees.

If more than 2% of C.B. employees are professional

If more than 2 percent of the employees covered under a collective bargaining agreement are professional employees, all employees covered under the collective bargaining agreement are treated as non-collective bargaining unit employees.

1.401(a)(26)-6

Employees "benefiting under a plan"

In addition, for most plans the definition of who is benefiting under the plan for the purposes of the participation test is the same as the definition of benefiting employees for the purposes of the coverage tests. See Part V.

1.401(a)(26)-5

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Line B- former employees-minimum participation

General rule for testing former employees

A defined benefit plan must satisfy section 401(a)(26) with respect to former employees for a plan year only if the plan does not meet one of the exceptions to section 401(a)(26) and the plan is providing additional benefit accruals to former employees during the year. This would occur, for example, where the plan is amended to provide an ad hoc cost-of-living increase to former employees.

1.401(a)(26)-4(a)

Special Rule

A plan automatically satisfies section 401(a)(26) with respect to former employees if the plan benefits at least 5 former employees and either:

1. More than 95% of all former employees with vested accrued benefits benefit for the plan year, or

2. At least 60% of the former employees who benefit are nonhighly compensated former employees.

1. 401(a)(26)-4(c)

If special rule above not met, minimum participation rule applies

If the plan does not automatically satisfy section 401(a)(26) with respect to former employees, it must benefit at least the lesser of :

1. 50 former employees of the employer, or

2. the greater of:

   a. 40% of all former employees of the employer, or

   b. 2 former employees (or if there is only 1 former employee, such former employee).

For this purpose, those former employees excludable in testing for coverage of former employees are excludable. In addition. a former employee may be excluded (other than for the 95%/60% test above) if the present value of the former employee's vested accrued benefit does not exceed $5,000.

1.401(a)(26)-4(b)

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Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Line B- former employees-minimum participation, Continued

No Schedule Q requirement for former employees

Defined benefit plan applicants are not required to submit demonstrations of compliance with section 401(a)(26) with respect to former employees.

Line II.b. of the worksheet should be checked **Yes** unless factors present with the application indicate that the plan may not satisfy section 401(a)(26) with respect to former employees.

1.401(a)(26)-4(c), 1.401(a)(26)-6(c)

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Line C – Prior Benefit Structure

General Rule

A defined benefit plan that does not meet one of the exceptions to section 401(a)(26) must also satisfy section 401(a)(26) with respect to its prior benefit structure.

Prior benefit structure defined

A plan's prior benefit structure includes all accrued benefits (including amounts rolled over or transferred to the plan) as of the beginning of the plan year.

First test -- required number of employees have meaningful accrued benefits

This test is partly mechanical and partly facts and circumstances.

A plan will pass this test if at least the lesser of:

1) 50 employees and former employees of the employer or the
2) greater of:
    a) 40% of all the employer's employees and former employees or
    b) 2 employees (or if there is only 1 employee, such employee),

have meaningful accrued benefits under the plan.

Second test -- required number of employees currently accrue meaningful benefits

A plan will also pass this test if at least the lesser of:

1) 50 employees or the
2) greater of:
    a) 40% of all the employer's employees or
    b) 2 employees (or if there is only 1 employee, such employee)

currently accrue meaningful benefits under the plan.

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Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line C – Prior Benefit Structure, Continued

Multiemployer plan

(A multiemployer plan will satisfy this rule as long as it provides meaningful benefits (or accrued benefits) to at least 50 employees, considering all employees benefiting under the plan.)

Examples illustrating meaningful benefits

This rule is intended as an anti-abuse rule to prevent employers from maintaining plans the primary purpose of which is to function as individual plans for a few employees or for the employer. Therefore, the question of whether a defined benefit plan has meaningful accrued benefits or is providing meaningful benefit accruals is one of facts and circumstances.

- For example, an accrued benefit equal to .5% of total compensation times years of participation (or a current accrual rate of .5% of total compensation per year of participation) would generally be considered meaningful.
- On the other hand, an accrued benefit or current accrual less than this would not necessarily fail to be meaningful.

Facts and Circumstances analysis

Factors to consider are:

1) the level of current accruals;
2) comparative rates of accruals under the current and prior formulas;
3) currently projected accrued benefits versus benefits accrued as of the beginning of the year;
4) how long the current formula has been in effect;
5) how long the plan has been in effect; and
6) the number of employees with accrued benefits under the plan.

No schedule Q requirement to demonstrate compliance with prior benefit structure

Defined benefit plan applicants are not required to submit demonstrations of compliance with the section 401(a)(26) prior benefit structure rules.

Line II.c. of the worksheet should be checked Yes unless factors present with the application indicate that the plan is not functioning as an ongoing defined benefit plan providing meaningful benefits to a section 401(a)(26) group of employees.

Line C - Cite

1. 401(a)(26)-3

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part IV. Disaggregation, Permissive Aggregation, and Restructuring

Introduction

Some plans required to be disaggregated

Generally, each single plan must separately satisfy the coverage and nondiscrimination requirements.

However, certain types of plans are required to be disaggregated and the separate disaggregated plans that result must separately satisfy coverage and nondiscrimination.

Employers may aggregate or combine plans

In some circumstances, employers may aggregate or combine two or more plans in applying the ratio percentage test or the nondiscriminatory classification test for coverage purposes. (See Part V for a discussion of these terms.)

Aggregated plans must satisfy both coverage and nondiscrimination

In this case, the aggregate plan is also treated as a single plan for purposes of the nondiscrimination requirements.

For example, one plan, when viewed alone, may not satisfy the coverage requirements, but when the plan is combined with another plan, the resulting aggregate plan satisfies both the coverage and nondiscrimination requirements.

Certain plans may not be aggregated

Plans may be aggregated only if they have the same plan year. Also:

- separate plans that would be disaggregated if they were a single plan may not be aggregated,
- disaggregated parts of plans may not be aggregated, and
- ESOPs generally may not be aggregated with other ESOPs.

Finally, a plan may not be combined with two or more plans to form more than one single plan.

Aggregation of DB and DC plan

When a defined benefit plan is aggregated with a defined contribution plan, the aggregate DB/DC plan must satisfy the nondiscriminatory amount requirement (discussed in Part X) on the basis of a general test (rather than safe harbors) and special rules apply. See Part X.

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Restructuring plan into "component" plans-each component must satisfy coverage and nondiscrimination	Solely for purposes of the nondiscrimination requirements (including the permitted disparity requirements of section 401(l), a plan may be treated as consisting of two or more component plans. This is referred to as restructuring. If each component plan satisfies the coverage and nondiscrimination requirements as if it were a separate plan, the whole plan will be treated as satisfying the nondiscrimination requirements. The plan must still satisfy the coverage requirements on a non-restructured basis.
401(k)/401(m)	Section 401(k) and 401(m) plans may not be restructured.
Overview – Cites	**410(b)(6)(B), 1.410(b)-7, 1.401(a)(4)-1(c)(4), 1.401(a)(4)-9**

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Disaggregation, Permissive Aggregation, and Restructuring

Employer may request determination regarding aggregation

When an employer files a determination letter request for a plan, it may also request a determination regarding the plan being:

- mandatorily disaggregated (other than solely as a result of the plan benefiting both collectively bargained and non-collectively bargained employees),
- permissively aggregated with another plan, or
- restructured into component plans.

Demo 4 is required to be submitted with determination application

If such a request is made, the employer is required to include with its application a schedule relating to the disaggregation, aggregation, or restructuring. This should be labeled Demo 4. The information required in this schedule is discussed in lines a. and b.

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Disaggregation, Permissive Aggregation, and Restructuring

Plans are required to be disaggregated in the following situations:

1. Section 401(k) and 401(m) Plans

- A section 401(k) plan must be disaggregated from the portion of a plan that is not a section 401(k) plan, and
- a section 401(m) plan must be disaggregated from the portion of a plan that is not a section 401(m) plan. See Alert Guidelines 11 and 12.

2. ESOP and Non-ESOPs

The ESOP portion of a plan is disaggregated from the non-ESOP portion of the plan.

3. Plans benefiting otherwise excludable employees

If the employer applies the coverage rules separately to the portion of a plan that benefits only employees who satisfy age and service conditions lower than the greatest conditions permissible under section 410(a), this portion is then disaggregated from the portion benefiting those employees who have met the greatest age and service conditions permissible. This is, in effect, permissive disaggregation.

4. QSLOBs

The portion of a plan benefiting employees of one QSLOB is disaggregated from portions of the plan benefiting employees of other QSLOBs.

However, see Part II for an exception where a plan is being tested on an employer-wide basis.

5. Collectively and non-collectively bargained employees

The portion of a plan benefiting collectively bargained employees is disaggregated from the portion benefiting non-collectively bargained employees.

See Part V for the definition of collectively bargained employee.

(The collectively bargained portion of the plan automatically satisfies the coverage and nondiscrimination requirements.)

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Disaggregation, Permissive Aggregation, and Restructuring, Continued

6. Multiemployer and Multiple Employer Plans	Plans benefiting the employees of more than one employer (multiemployer and multiple employer plans) are disaggregated along employer lines. Each employer's separate disaggregated plan must then satisfy the coverage and nondiscrimination requirements with reference only to that employer's employees.
Employees who change status (QSLOBs, collectively bargained, multiemployer)	When a plan is disaggregated as a result of the rules in paragraphs 4., 5., or 6., special rules apply with respect to employees who change status so that they move from one portion of the plan to another. These rules permit certain accruals or allocations for these employees that would otherwise be taken into account under one separate disaggregated plan to be taken into account under another separate disaggregated plan.
Line A - Cite	**1.410(b)-7(c)**

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Disaggregation, Permissive Aggregation, And Restructuring, Line A – Required Demonstration

Required information to be included in Demo 4

If a determination is requested, the employer must submit a schedule (Demo 4) that provides the following information:

1. an explanation of the basis of the disaggregation, aggregation, or restructuring;

2. an identification of the aggregated, separate disaggregated, or restructured component plans; and

3. a demonstration of how any restructured component plans satisfy the minimum coverage requirements as if they were separate plans.

Check aspects of permissive aggregation

In the case of permissive aggregation, make sure that the employer is not aggregating plans with different plan years or plans that may not be aggregated, as described above.

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Line A- restructuring

Restructured component -- check aspects of each component

If the plan is being restructured, the employer may select the groups of employees that will form the basis of the restructuring, but check that each component:

1) consists of all the allocations or accruals and other benefits, rights, and features (BRFs) provided to the selected group,

2) that each employee is assigned to a particular component, and

3) that components do not overlap.

Component satisfies average benefit percentage test if plan passes test

A demonstration that a restructured component separately satisfies coverage should be made in accordance with the guidelines in Part V. (Remember, the plan as a whole must still satisfy coverage.) However, certain special rules apply.

In general, a component will satisfy the average benefit percentage test (discussed in Part V) if the whole plan passes this test.

Other special rules apply

Other special rules apply regarding the application of the average benefit percentage test with respect to plans benefiting both collectively bargained and non-collectively bargained employees and plans with early retirement window benefits.

For QSLOB requirements, each component must satisfy the gateway test

Note also that if the employer is using the QSLOB rules for purposes of coverage and nondiscrimination, the employer's demonstration that the restructured component plans satisfy section 410(b) as if they were separate plans must include a demonstration that each component satisfies the gateway test.

Refer to Part II, lines a. and b., for a further discussion of the application of section 410(b) when the employer is using the QSLOB rules.

Line B - Cite

1.401(a)(4)-9(c)

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Line B – Separate coverage and nondiscrimination information for each plan

Check information for each disaggregated plan	If the plan is disaggregated, check that the employer has submitted coverage and nondiscrimination information (including demonstrations, if applicable) for each separate disaggregated plan (other than any separate disaggregated plan that benefits only collectively bargained employees.)
Information reflects participants in permissively aggregated plan	If the plan is permissively aggregated with another plan, make sure that the coverage and nondiscrimination information and demonstrations submitted reflect the terms of, and the participants in, the aggregated plan. If the plan is a DB/DC plan, make sure that the employer has identified the plan as a general test (not safe harbor) plan, and that any demonstration of the general test reflects the special rules that apply to these plans. (See Part X.)
Information for each restructured component	If the plan is restructured, check that the nondiscrimination requirements (including the availability of BRFs discussed in Part VI) are addressed separately with respect to each component. Also, ensure that section 401(k) or 401(m) plans are not being restructured.

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part V – Coverage

Introduction

Two overall coverage requirements

A qualified plan generally must satisfy either the

a) "ratio percentage test" described in section 410(b)(1)(B) of the Code, or the

b) "average benefit test" described in section 410(b)(2).

(Certain nonelecting church plans may be allowed to satisfy the coverage requirements as they were in effect prior to ERISA.)

Employer may request determination regarding average benefit test

When an employer files a determination letter application under Form 5300 of Form 5307, the employer must indicate whether this is a request for a determination regarding the ratio percentage test or a request for a determination regarding one of the special requirements of section 1.410(b)-2(b)(5), (6), or (7).

If the plan does not satisfy either the ratio percentage test or one of the special requirements of the regulation, the employer may file a Schedule Q and request a determination regarding the average benefits test. (In the case of a Form 5310, the employer must indicate which coverage test is satisfied and provide the required information.)

- If the plan is meeting coverage on the basis of the ratio percentage test or one of the special requirements, the employer must provide the information required by the Form 5300 or the Form 5307.

- If the employer is using the average benefit test, the employer may elect to submit a demonstration (which should be identified as Demo 5) or to receive a caveated letter.

Coverage of former employees only apply to DB plans

The minimum coverage requirements apply to both current and former employees. However, the coverage of former employees is not an issue in defined contribution plans; therefore, line c., which discusses the coverage of former employees, does not apply to defined contribution plans.

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Testing options for coverage

Introduction

The minimum coverage requirements must be satisfied using a:

1. daily,
2. quarterly, or
3. annual testing option for the plan year,

which is the same option used to meet section 401(a)(4) for the plan year.

Plan provisions and other relevant facts as of the last day of the plan year are applied to determine which employees benefit for such plan year.

Daily testing option

If the daily testing option is used, the plan satisfies 410(b) for a plan year if it satisfies the minimum coverage requirements on each day of the plan year, looking only to that day to determine employees and former employees.

Quarterly testing option

Under the quarterly testing option, section 410(b) is deemed satisfied for the plan year if the plan meets the minimum coverage requirements on one representative day in each quarter of the year, looking only to those four days to determine employees and former employees.

Annual testing option

Under the annual testing option (which must be used for section 401(k) and section 401(m) plans and average benefit plans), a plan is deemed to satisfy section 410(b) for the plan year if it satisfies the minimum coverage requirements as of the last day of such plan year; however, the whole year is looked at to determine employees and former employees.

Correction for failing minimum coverage requirement

A plan that fails the minimum coverage requirements for the plan year may be retroactively amended by the 15th day of the 10th month following such year to satisfy section 410(b) by, for example, expanding coverage.

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Snapshot testing -- Revenue Procedure 93-42

Introduction

Rev. Proc. 93-42, 1993-2 C.B. 540, allows employers to substantiate compliance with the nondiscrimination rules (including the minimum coverage requirements) on the basis of the employer's workforce on a single day during the plan year (snapshot day), provided that day is reasonably representative of the employer's workforce and the plan's coverage throughout the year.

Even though a favorable determination letter may not be relied on with respect to the use of the substantiation guidelines in Rev. Proc. 93-42, employers may submit coverage and nondiscrimination demonstrations that are the result of single day "snapshot" testing.

5 percent adjustment

Rev. Proc. 93-42 also provides that the use of snapshot testing may overstate coverage in plans that have minimum service requirements for accruals or allocations (e.g., 1000 hours of service or employment on the last day of the plan year).

Rev. Proc. 93-42 further provides that to compensate for this, an adjustment must be made to the section 410(b) test and provides that an adjustment of 5 percent (i.e., 70 percent becomes 73.5 percent) for a 1,000 hour rule and an adjustment of 10 percent (i.e., 70 percent becomes 77 percent) for a last day rule (or for a combination of a last day and another minimum service rule) will be treated as safe harbors.

Specialist generally will not question use of snapshot testing

Because a favorable determination letter is not a determination regarding the use of the substantiation guidelines in Rev. Proc. 93-42, the specialist generally should not question the use of snapshot testing (if this is evident in the application) or any adjustments that the employer has made to the section 410(b) test on account of the use of snapshot testing.

Coverage -- Transition rule for mergers and acquisitions

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General rule

Where there has been a merger or stock or asset acquisition or disposition and as a result there is a change in the make up of the employer (i.e., the section 414(b), (c), (m), and (o) employer), a special transition rule applies.

Under this transition rule, a plan of the employer may be treated as satisfying the minimum coverage requirements during a transition period following the transaction if it satisfied section 410(b) immediately before the transaction and there has been no significant change in the plan's coverage aside from the transaction.

Transition period defined

The transition period begins with the transaction and ends with the end of the first plan year beginning after the transaction.

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Coverage-Controlled group, affiliated service group, and leased employees

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Effect of 414(b),(c), and (o)

<u>If the adopting employer is a member of</u>

a) an affiliated service group,

b) a member of a controlled group of corporations, or

c) one of several trades or businesses under common control,

then the employees of all these employers must generally be taken into account in determining whether the coverage requirements are satisfied.

However, for an exception to this rule, refer to Part II, regarding employers that treat themselves as operating QSLOBs.

Overview - Cite

1.410(b)-2 through -10

Cross-reference to sections 414(b),(c), and (m) and corresponding regulations

See:

- IRC sections 414(b) and (c) and section 1.414(c)-1 through -5 of the regulations to determine whether the entities are members of a controlled group of corporations or trades or businesses under common control, and
- Section 414(m) and section 1.414(m)-1 through -4 of the proposed regulations regarding whether entities are members of an affiliated service group.

Leased

In addition, any leased employee of the adopting employer or any

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employees treated as employees of "recipient" employer unless leasing organization sponsors specific money purchase plan

other member of an affiliated service group, controlled group of corporations, or group of trades or businesses under common control of which the adopting employer is a part shall be treated as an employee of the adopting employer, unless leased employees do not constitute more than 20 percent of the recipient's nonhighly compensated workforce, and the employee is covered by a money purchase plan providing:

1. a nonintegrated employer contribution rate of at least 10% of compensation,

2. immediate participation, and

3. full and immediate vesting.

See section 414(n) of the Code and Notice 84-11, 1984-2 C.B. 469, to determine whether an individual is a leased employee

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Mandatory disaggregation and permissive aggregation

Mandatory disaggregation

Certain plans are required to be disaggregated, and each separate disaggregated plan that results must separately satisfy the coverage requirements.

Plan aggregation and restructuring

In some circumstances, employers may aggregate two or more plans and treat them as a single plan for coverage purposes.

For purposes of satisfying the nondiscrimination requirements, employers may restructure a single plan into separate component plans.

When this is done, the plan and each separate component plan must separately satisfy the coverage requirements. See Part V for a discussion of these rules.

1.410(b)-7, 1.401 (a)(4)-9(c)

Plans exempt from coverage requirements

Specific plans that do not have to satisfy coverage

This section of the worksheet does not apply to the following plans (other than a plan subject to the requirements of section 403(b)(12)(A)(i)) :

1. a church plan, unless the plan administrator makes an irrevocable election under IRC 410(d) to have the coverage requirements apply to the plan

2. a plan which has not at any time after September 2, 1974, provided for employer contributions, and

3. a plan established by a society, order or association described in Code section 501(c)(8) or (9), if no part of the contributions under the plan are made by employers of participants in the plan.

Above exempt

These plans are subject to the requirements of section 401(a)(3) as in

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plans still subject to Pre-ERISA coverage rules	effect on September 1, 1974. If the employer has correctly indicated that it is subject to the pre-ERISA coverage requirements, complete only line a. of this Part and answer line a. "yes" unless it is determined that the plan fails to satisfy the pre-ERISA coverage requirements.
Cites – Exempt plans	**1.410 (b)-2 (e), 1.410(d)-1**

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Line A – Ratio Percentage Test: statutory background and calculation

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Overview – Ratio percentage test

A plan satisfies the "ratio percentage test" of IRC section 410(b)(1)(B) with respect to employees if:

- the percentage of the employer's nonhighly compensated employees (nonHCE) who benefit under the plan, divided by
- the percentage of highly compensated active employees (HCE) who benefit under the plan is at least 0.70 (percentages are calculated to the nearest hundredth.)

That is,

$$\frac{\text{\% of nonHCE benefiting}}{\text{\% of HCE benefiting}} \geq 0.7$$

Example illustrating ratio percentage test

Employer Y has 100 employees. Thirty of these employees are highly compensated employees under IRC section 414(q). Y maintains a qualified plan (Plan A) that benefits 15 of the 30 HCE, that is, 50 percent of Y's HCE.

Plan A also benefits 25 of the 70 nonHCE, or 35.71 percent of all nonHCE.

Plan A satisfies the ratio percentage test because the percentage of nonhighly compensated active employees benefiting (35.71 percent) is at least 70 percent of the percentage of highly compensated employees benefiting (50 percent).

$$\frac{\text{35.71\% of nonHCE}}{\text{50\% of HCE}} = 0.7142$$

Regulations merged 410(b)(1)(A) and 410(b)(2)(B) tests

The regulations merged the percentage test of IRC section 410 (b) (1) (A) and the ratio test of IRC section 410 (b) (1) (B) into the "ratio percentage test" because a plan that satisfies the percentage test of IRC section 410(b)(1)(A) (at least 70 percent of all nonhighly compensated employees benefit) will necessarily also satisfy the ratio test.

Cite: **1.410(b)-2**

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Coverage --definitions of employee and highly compensated employees

Definition of employee

An employee is an individual who performs services for the employer.

Former employee

An employee becomes a former employee on the day after the day on which he or she stops performing services for the employer. Thus, one employee may be both an employee and a former employee for the same plan year.

When former employee is treated as an employee

A former employee is treated as an employee with respect to allocations that are taken into account under the defined contribution plan nondiscrimination in amount general test and with respect to increases in accrued benefits under a defined benefit plan based on ongoing service or compensation credits (including imputed service or compensation.)

1. 410(b)-9

Definition of HCE

The definition of highly compensated employee is provided in IRC section 414(q).

If a plan includes a definition of highly compensated employee the specialist should refer to Alert Guidelines #11 or #12 to determine if the definition satisfies the requirements of section 414(q).

Definition of NHCE

A nonhighly compensated employee is any employee who does not fit within the definition of highly compensated employee.

Plans benefiting either no NHCEs or no HCEs

Note that under a special rule in section 1.410(b)-2(b)(5), if the employer has no nonhighly compensated employees the plan will be deemed to satisfy the coverage tests of IRC section 410(b).

Also, under 1.410(b)-2(b)(6), if no highly compensated employees benefit under the plan section 410(b) will be deemed satisfied. Also, under 1.410(b)-2(b)(7), section 410(b) is satisfied if the plan benefits solely collectively bargained employees.

1. 410(b)-2(b)(5), (6) and (7)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line A –Coverage, employee exclusions- minimum age and service

Certain employees disregarded	In testing a qualified plan for coverage, except as provided in 4., below, the following employees must be disregarded:
1. General rule – age and service	All employees who have not attained age 21 and completed one year of service, or two years in the case of a plan with immediate vesting, are disregarded in testing a qualified plan which has such eligibility requirements.
If plan benefits excluded employees	However, if a plan benefits any such otherwise excludable employee, it must test coverage based on the minimum age and service requirements under the plan.
Alternative test	In the alternative, employees who have not attained age 21 and completed one year of service but have attained the plan's minimum age and service requirements may be tested for coverage as if they were in a separate plan. The rest of the plan participants may then be tested for coverage disregarding employees who have not attained age 21 or do not have one year of service.
When employees no longer excluded	A plan may continue to treat employees who have met the minimum age and service requirements as excludable until the first plan entry date on which any employee with the same age and service would be eligible to commence participation. **410(b)(4), 1.410(b)-6(b), 1.410(b)-7(c)(3)**

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Line A- coverage -- employee exclusions -- collectively bargained and nonresident alien employees

2. General rule -- collectively bargained employees

For the purposes of testing a plan or portion of a plan covering non-collectively bargained employees for coverage, employees who are included in a unit of employees covered by an agreement (within the meaning of section 7701(a)(46)) that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers are excluded if there is evidence that the retirement benefits were the subject of good faith bargaining between such employee representatives and such employer or employers.

2% exception

However, if more than 2 percent of the employees who are covered under a collective bargaining agreement are professional employees within the meaning of section 1.410(b)-9 of the regulations, all employees covered under such collective bargaining unit are treated as non-collective bargaining unit employees.

Special rules for certain employees

Special rules apply with respect to employees who perform services both as collectively bargained and non-collectively bargained employees, and also with respect to employees in multiemployer plans.

1. 410(b)-6(d)

3. Non-resident aliens

Nonresident aliens (within the meaning of section 7701(b)(1)(B)) who receive no earned income (within the meaning of section 911(d)(2)) from the employer that constitutes income from sources within the United States (within the meaning of section 861(a)(3)) are excluded for the purposes of testing any qualified plan of the employer for coverage.

In addition, nonresident aliens who do have income described in the previous sentence are also excluded if, pursuant to a treaty, it is exempt from U.S. income tax and all such aliens are excluded.

1.410(b)-6(c)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line A- coverage -- employee exclusions last day, no more than 500 hours of service

4. General rule – No more than 500 hours

Employees who fail to receive an allocation or to accrue a benefit solely because they fail to satisfy a minimum hour of service or last day requirement under the plan may be excluded for the purposes of testing the plan for coverage if:

- they do not have more than 500 hours of service, and
- they are not employed on the last day of the plan year.

If employees work more than 500 hours

Employees who have more than 500 hours of service or who are employed on the last day of the plan year may not be excluded merely because they are not employed on the last day of the plan year or did not have sufficient hours of service under the plan to accrue a benefit or receive an allocation for the plan year.

Thus, even though these employees are ineligible to benefit under the plan for a plan year, they are taken into account in determining the percentage of employees who do benefit.

Example illustrating more than 500 hours of service

For example, if an employer's profit-sharing plan required 1,000 hours of service in order to get an allocation from the plan and 10 of the employer's employees have more than 500 but less than 1,000 hours of service, the 10 employees will not be excludable employees because they have less than 1,000 hours of service and they will be treated as employees who do not benefit for the purposes of the coverage tests.

Modification for plan using elapsed time

For a plan using elapsed time, "91 consecutive days" or "3 consecutive calendar months" should be substituted for "500 hours of service" in the preceding paragraph. Adjustment is also required if the plan uses one of the equivalencies for crediting hours of service in DOL Regs. section 2530.200(b)-3.

Excluded employees – Cite

1.410(b)-6(f)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line A- coverage -- employee exclusions employees of QSLOBs, former and governmental employees

Employees of QSLOBs:

In testing a plan that benefits employees of an employer's QSLOB (within the meaning of section 414(r) and the regulations thereunder), employees of the employer's other QSLOBs are excluded.

However, this rule does not apply in determining whether a plan satisfies the gateway test that requires the plan to satisfy the nondiscriminatory classification requirement on an employer-wide basis.

It also does not apply when a plan is being tested as an employer-wide plan. See Part II.

1.410(b)-6(e)

Former Employees Treated as Employees

Formerly nonhighly compensated employees who are treated as employees under a defined benefit plan because of ongoing service or compensation credits after cessation of service (including imputed service or compensation) may be excluded.

1.410(b)-6(i)

Employees of Certain Governmental or Tax-Exempt Entities

If a section 401(k) plan, or a section 401(m) plan provided under the same general arrangement as a section 401(k) plan, is maintained by an employer that is part of a controlled group which contains governmental or tax-exempt entities which are precluded from adopting a section 401(k) plan by section 401(k)(4)(B), then employees who are so excluded from participating are excluded in testing for coverage but only if more than 95% of the employees who are not statutorily ineligible to participate benefit under the plan.

Note that Notice 96-64 allows tax-exempt entities to continue to use this rule only through the 1997 plan year. Tax-exempt entities may not avail themselves of this rule in plan years after the 1997 plan year.

1. 410(b)-6(g)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line A-Employees benefiting under the plan for coverage purposes

General rule

In general, an employee is treated as benefiting for the purposes of the coverage tests, only if the employee receives an allocation of contributions or forfeitures, or accrues a benefit under the plan for the plan year.

Exceptions-employee treated as benefiting even with no allocation

However, employees are treated as benefiting if they fail to receive an allocation of contributions and/or forfeitures, or to accrue a benefit solely because the employee is subject to plan provisions that uniformly limit plan benefits, such as:

- a provision for maximum years of service,
- maximum retirement benefits, or
- application of offsets or fresh start wear-away formulas

Section 415 limits disregarded

Limits designed to satisfy section 415 are disregarded for purposes of determining if an employee is benefiting under a defined benefit plan.

Such limits may also be disregarded in determining if an employee is benefiting under a defined contribution plan, provided this is done on a consistent basis for all employees.

Employees not treated as benefiting if 415 limits increase

Employees are not treated as benefiting solely because of increases in accrued benefits that result from increases in the section 415 limits due to the adjustment section 415(d)(1) or additional service credited for section 415 purposes.

(Plan provisions implementing section 415 may not be disregarded, however, if the employer is demonstrating compliance with the defined benefit general test and is taking these provisions into account in determining accrual rates.)

Target benefit and section 412(i) plans

Special rules apply in the case of target benefit plans and section 412(i) plans.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line A-Employees benefiting under the plan for coverage purposes, Continued

DC plan satisfies 410(b) if no employees receive allocation	A defined contribution plan under which no employee receives an allocation of contributions or forfeitures for the plan year is treated as satisfying section 410(b) for such plan year because no highly compensated employee is benefiting. Thus, a defined contribution plan for which contributions cease and for which no forfeiture can be allocated satisfies the coverage rules.
DB plan satisfies 410(b) if no accrual of additional benefits	Similarly, a defined benefit plan under which no employee accrues any additional benefits for the plan year will satisfy section 410(b) for the plan year. However, if the plan is required to provide top-heavy accruals for the plan year, or if the plan takes future compensation increases into account in determining accrued benefits, the plan will have to be tested for coverage.
Employee benefits under 401(k)/(m) if eligible to participate	An employee is treated as benefiting under a plan to which elective contributions or after-tax employee contributions and matching contributions subject to section 401(k) or 401(m) may be made if the employee is currently eligible to make such elective or after-tax employee contributions, or to accrue a matching contribution, whether or not the employee actually makes or receives such contributions.
Benefiting - Cite	**1. 410(b)-3**

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B(i) – Nondiscriminatory Classification Test and line B(ii) – Average Benefit Percentage Test

Employer may request determination for satisfying average benefit test

Complete this line b. only if the employer has requested a determination that the plan satisfies the average benefit test.

If the employer has requested such a determination, the employer is required to submit a demonstration that this test is satisfied. This demonstration should be identified as Demo 5.

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Average benefit test has two parts

The average benefit test is a two part test.

- First, the plan must satisfy the nondiscriminatory classification test.
- Second, the plan must satisfy the average benefit percentage test.

Explanation only applies to nondiscriminatory classification test

The explanation that follows relates to the nondiscriminatory classification test only. To determine if the plan satisfies the average benefit percentage test, refer to the discussion of this test in the appendix in Explanation 5C.

The nondiscriminatory classification test is described here rather than in the appendix because this test may be used to determine whether the plan satisfies certain nondiscrimination requirements, such as the requirement that benefits, rights, and features be made available in a nondiscriminatory manner. See Part VI.

Overview - Cite

410(b)(2)
1.410(b)-2(b)(3)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B(i) – Nondiscriminatory Classification Test

Two-prong test to satisfy nondiscriminatory classification test

In order to satisfy the nondiscriminatory classification test, the plan must meet two requirements.

1) First, the classification of employees who benefit under the plan that is established by the employer must be reasonable.

2) Second, it must be nondiscriminatory.

1st prong-defining reasonable classification

A reasonable classification is one that is both reasonable and based on objective business criteria that identify the categories of employees who will benefit, such as salaried or hourly.

Enumeration by name or other criteria with the same effect is not reasonable.

2nd prong: Nondiscriminatory

Determining if a classification is nondiscriminatory may involve both a mechanical and a facts and circumstances analysis.

If plan's ratio percentage is equal or greater than safe harbor percentage

First, the classification will be nondiscriminatory if the plan's ratio percentage is at least equal to the employer's safe harbor percentage. (See line a. for the definition of ratio percentage, including the meaning of benefiting and excludable employee.)

Defining safe harbor percentage

An employer's safe harbor percentage is 50 percent, reduced by 3/4 of one percent for each whole percent by which the nonhighly compensated employee (NHCE) concentration percentage exceeds 60 percent.

NHCE concentration percentage defined

The NHCE concentration percentage is the percentage of all the employees of the employer who are nonhighly compensated.

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Line B(i) – Nondiscriminatory Classification Test, Continued

Safe Harbor percentages in table below

The safe harbor percentages for the various possible NHCE percentages are shown in the table below.

If plan's ratio percentage is less than safe harbor percentage

Second, if the plan's ratio percentage is less than the safe harbor percentage, the classification will nevertheless be nondiscriminatory if:

- the ratio percentage is at least equal to the employer's unsafe harbor percentage and
- the Service determines, on the basis of facts and circumstances, that the classification is nondiscriminatory.

Thus, in this situation, the specialist will need to look at the employer's particular facts to make this determination.

Unsafe harbor percentage defined

An employer's unsafe harbor percentage is 40 percent, reduced by 3/4 of one percent for each percent by which the NHCE concentration percentage exceed 60 percent.

The unsafe harbor percentage is never less than 20 percent.

Facts and circumstances analysis when ratio percentage between safe and unsafe harbor

Among the facts and circumstances the specialist should consider in determining whether a classification that falls between the safe and unsafe harbor percentages is nondiscriminatory are the following:

a) the business reason for the classification (reducing benefits costs is not relevant);

b) the percentage of all employees benefiting under the plan (the higher the better);

c) whether the plan benefits representative numbers of employees in each salary range;

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Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B(i) – Nondiscriminatory Classification Test, Continued

Facts and circumstances analysis when ratio percentage between safe and unsafe harbor (continued)

d) how close the plan's ratio percentage is to the employer's safe harbor percentage; and

e) the extent to which the plan's average benefit percentage exceeds 70 percent.

f) No one fact is determinative.

Table below

The table below provides the safe and unsafe harbor percentages for the NHCE concentration percentages.

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Line B(i) – Nondiscriminatory Classification Test, Continued

NHCE Concentration Percentage	Safe Harbor Percentage	Unsafe Harbor Percentage
0-60	50.00	40.00
61	49.25	39.25
62	48.50	38.50
63	47.75	37.75
64	47.00	37.00
65	46.25	36.25
66	45.50	35.50
67	44.75	34.75
68	44.00	34.00
69	43.25	33.25
70	42.50	32.50
71	41.75	31.75
72	41.00	31.00
73	40.25	30.25
74	39.50	29.50
75	38.75	28.75
76	38.00	28.00
77	37.25	27.75
78	36.50	26.50
79	35.75	25.75
80	35.00	25.00
81	34.25	24.25
82	33.50	23.50
83	32.75	22.75
84	32.00	22.00
85	31.25	21.25
86	30.50	20.50
87	29.75	20.00
88	29.00	20.00
89	28.25	20.00
90	27.50	20.00
91	26.75	20.00
92	26.00	20.00
93	25.25	20.00
94	24.50	20.00
95	23.75	20.00
96	23.00	20.00
97	22.25	20.00
98	21.50	20.00
99	20.75	20.00

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Line B(i) – Nondiscriminatory Classification Test, Continued

Nondiscriminatory classification – Cite

1.410(b)-4

Line B(ii) – Average Benefit Percentage Test

Reference to Explanation 5C

See the appendix in Explanation 5C to determine whether the plan satisfies the average benefit percentage test.

1.410(b)-5

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Line C – Satisfaction of Coverage – Former Employees

Overview-if group benefiting does not discriminate significantly in favor of highly compensated former employees

A plan must separately satisfy the minimum coverage requirements with respect to its former employees. A plan will satisfy the minimum coverage requirements with respect to former employees if the facts and circumstances indicate that the group of former employees benefiting under the plan does not discriminate significantly in favor of highly compensated former employees.

Employers are not required to submit demonstrations regarding this requirement when a determination letter application is filed. Line V.c. should be checked "yes" unless facts present with the application indicate that the plan may not satisfy this requirement.

Among the facts and circumstances taken into account is the group of nonexcludable former employees who do not benefit under the plan.

Former employee defined

An employee becomes a former employee on the day after the day on which he or she stops performing services for the employer. Thus, one employee may be both an employee and a former employee for the same plan year.

When a former employee benefits

A former employee is treated as benefiting for a plan year if an accrual or allocation arises with respect to the employee's status as a former employee (such as an ad hoc cost of living adjustment provided to former employees).

Excludable former employees

A former employee who was an excludable employee at the time of termination under the rules described under line V.a. may be excluded even if benefiting in the current plan year.

Employer may elect to exclude certain employees

The employer may elect to exclude former employees who became former employees before January 1, 1984, or the tenth calendar year preceding the year in which the current plan year begins, and before the earliest calendar year in which any currently benefiting former employee became a former employee.

(Because section 415 limits annual additions to a defined contribution plan to 100 % of a participant's compensation, defined contribution plans generally will not benefit former employees.

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Line C – Satisfaction of Coverage – Former Employees,

Continued

If receive allocation based on Imputed compensation	Note that an employee who has ceased employment with an employer but receives allocations based on imputed compensation is tested as an employee, not a former employee.)
Coverage passed if either no HCEs or no NHCEs benefit	A plan automatically satisfies section 410(b) with respect to its former employees if it benefits no highly compensated former employees or has no nonhighly compensated former employees.
Line C - Cite	**1.410(b)-2(c) , 1.410(b)-3(b), 1.410(b)-6(h), 1.410(b)-8(a), 1.410(b)-9**

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part VI – Benefits, Rights and Features

Introduction

One of the requirements a plan must satisfy in order to meet the nondiscrimination requirement of section 401(a)(4) is that all benefits, rights, and features (BRFs) provided under the plan must be made available in the plan in a nondiscriminatory manner.

What does benefits rights and features include

BRFs include:

1) all optional forms of benefit,

2) ancillary benefits, and

3) other rights and features available to any employee under the plan.

Two requirements for benefits, rights, and features

A BRF is made available in a nondiscriminatory manner if it meets both:

- a current availability requirement, and
- an effective availability requirement.

Current availability requirement

A BRF satisfies the current availability requirement if it is currently available to a group of employees that constitutes a nondiscriminatory coverage group under the minimum coverage rules of section 410(b).

Effective availability requirement

A BRF satisfies the effective availability requirement if, on the basis of facts and circumstances, it is available to a group of employees that does not substantially favor highly compensated employees. Special rules allow certain BRFs to be treated as satisfying these requirements.

Cites

1.401(a)(4)-1(b)(3), 1.401(a)(4)-4

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BRFs, Line A – Current Availability

Specialists cannot review for effective availability

Because the effective availability requirement is essentially an anti-abuse rule, determination letters may not be relied on as to whether any BRF satisfies this requirement and specialists should not review a plan with regard to this requirement.

Employers can request review of current availability

In general, determination letters are also caveated with respect to the current availability requirement.

However, employers may request the Service to determine whether specific BRFs under the plan satisfy the current availability requirement.

When an employer files a determination letter request for a plan, it must indicate whether it is requesting a determination regarding the current availability of BRFs.

Line B –each BRF must be specified for review

Specific determination for each BRF- and employer should provide Demo 3

If the employer requests a determination regarding the current availability of BRFs, the employer is required to specify each BRF for which it is seeking such a determination and to demonstrate that each such BRF satisfies the current availability requirement. (This should be identified in the employer's application as Demo 3.) Only those BRFs that are specified by the employer should be considered.

Employer can ask if plan provision is not separate BRF

Some employers may ask for a determination that a plan provision does not create a separate BRF that must separately meet the nondiscriminatory availability requirements. In this case, if it is determined that the provision does give rise to a separate BRF, the employer should be asked to demonstrate that the BRF satisfies the current availability requirement.

Demonstration 3 guidelines-explanation of instructions to Schedule Q

Introduction

The instructions for Schedule Q (Form 5300) contain guidelines that employers may follow in making this kind of demonstration.

The explanation that follows tracks the guidelines in the instructions for Schedule Q.

Demo 3-Schedule Q instructions-Line 1a and 1b-identification of BRF

Employer specified BRF must be a separate BRF

In reviewing this information, the specialist should determine that the specified BRF is a separate BRF within the meaning of the regulations (however, also see line 2. below) and that all terms that could affect the availability of the BRF to employees have been identified.

Generally, each BRF must meet nondiscriminatory availability requirements

Each different optional form of benefit, ancillary benefit, and other right and feature available to any employee under the plan is generally a separate BRF that must separately meet the nondiscriminatory availability requirements. (See line 2., below, for circumstances in which BRFs may be permissively aggregated for this purpose.)

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First type of BRF -- optional form of benefit

An optional form of benefit is:

1) any distribution alternative (including the normal form of benefit) that is available with respect to accrued benefits,

2) early retirement benefits, and

3) retirement-type subsidies.

Different optional forms exist if form not payable on same terms

Different optional forms exist if a distribution alternative is not payable on substantially the same terms as another alternative. Such differences can arise from any terms affecting the value of the optional form, such as:

- timing,
- commencement,
- election rights, and
- actuarial assumptions.

Second type of BRF -- ancillary benefits

Ancillary benefits generally include, but are not limited to the following:

- Social Security supplements (other than qualified Social Security Supplements, as defined in the regulations)
- Disability benefits not in excess of the qualified disability benefit described in section 411(a)(9)
- Ancillary life and health insurance
- Death benefits
- Plant shut-down benefits

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Third type BRF --rights and features

Other rights and features include:

- Loans
- Self-direction investment rights
- Right to a given form of investment
- Right to invest in employer securities
- Right to make each rate of elective and employee contributions
- Right to each rate of matching contributions
- Right to purchase additional ancillary benefits
- Right to make rollovers and transfers

BRF must be available on substantially same terms

Different ancillary benefits (or rights and features) exist if an ancillary benefit (or right or feature) is not available on substantially the same terms as another ancillary benefit (or right or feature).

Differences may cause a distribution alternative to remain a single optional form of benefit

A distribution alternative will not fail to be a single optional form of benefit simply because benefit or allocation formulas, accrual methods, or vesting schedules pertaining to the accrued benefit that is paid in the form of the distribution alternative are different for different employees to whom the distribution alternative is available.

Differences in the normal retirement ages of employees, however, are taken into account in determining whether a distribution alternative constitutes one or more optional forms of benefit

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Identification of BRF - Cite

1.401(a)(4)-4(a),1.401(a)(4)-4(e)

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BRF-Demo 3-Schedule Q-instructions-line 1c, conditions disregarded in determining current availability

List of conditions that are disregarded

The determination of whether a BRF is currently available is based on the current facts and circumstances of the employee, except that conditions specified in the regulations including conditions requiring a:

- specific vesting percentage,
- termination of employment,
- death,
- disability,
- family status,
- hardship,
- execution of a covenant not to compete, and,
- in the case of optional forms of benefit and social security supplements only, attainment of specified age and/or service (other than time-limited age or service conditions)

are disregarded.

Loan condition disregarded

Also disregarded is a loan condition requiring a minimum account balance for a minimum loan amount (not in excess of $1,000).

Mandatory cash outs -- disregard condition for vested accrued benefit

If a plan provides for mandatory cash-outs of all terminated employees with vested accrued benefits not in excess of $5,000 (or lower stated amount), it can also disregard a condition that requires the employee to have a vested accrued benefit of that amount in order to receive a benefit, right or feature.

Multiemployer plans

Special rules also apply in the case of multiemployer plans.

Cite

1.401(a)(4)-4(b)(2)

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BRF-Demo 3-Schedule Q instructions-line 1d, unpredictable contingent event benefits

General rule Unpredictable contingent event benefits

Although current availability is generally determined on current facts and circumstances, the current availability of an unpredictable contingent event benefit, such as a plant shut-down benefit, is determined as if the event has occurred, disregarding any age or service conditions for eligibility for the benefit (other than time-limited conditions).

1.401(a)(4)-4(d)(7)

BRF-Demo 3-Schedule Q instructions-line 1e-early retirement window benefits

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Definition of early retirement window benefits

There is a special rule for determining the current availability of early retirement window benefits. For this purpose, an early retirement window benefit is an early retirement benefit or subsidy or other BRF that is available only to employees who terminate employment during a "window" period of not more than one year set by the plan.

Special rule

Under this special rule, an early retirement window benefit is treated as <u>not</u> being available to an employee for a plan year other than the first plan year in which the benefit is currently available to the employee.

Special rule should be properly applied

If the specified benefit is an early retirement window benefit, the specialist should ensure that the employer's demonstration shows that this special testing rule has been properly applied.

1.401(a)(4)-4(d)(3)

BRF-Demo 3-Schedule Q instructions-line 2, permissive aggregation of BRF

Introduction

An employer may permissively aggregate an optional form of benefit, ancillary benefit, or other right or feature with another optional form of benefit, ancillary benefit, or other right or feature, respectively, and treat the combined BRF as a single BRF.

When

<u>Aggregation is permitted only if:</u>

permissive aggregation is permitted

1) one of the two BRFs is inherently of equal or greater value than the other, and

2) the BRF that is of inherently equal or greater value must separately satisfy nondiscriminatory availability.

Aggregated benefit must satisfy requirements

If a specified benefit for which the employer is providing a demonstration is an aggregated benefit, the employer must also demonstrate that the requirements in (a) and (b) have been satisfied.

Requirement for aggregation -- defining "inherently" equal or greater value

A BRF is of inherently equal or greater value than another only if it is impossible under any circumstances for an employee to receive less under the first BRF than under the second.

For example, a fully subsidized joint and survivor annuity is of inherently equal or greater value than a normal form straight life annuity but is not of inherently equal or greater value than a lump sum that is actuarially equivalent to the normal form because under some circumstances the participant would receive less under the fully subsidized QJSA than under the lump sum.

Permissive Aggregation - Cite

1.401(a)(4)-4(d)(4)

BRF-Demo 3-Schedule Q instructions-line 3, employees to whom BRF is available

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General rule

The employer must describe the group of employees to whom the BRF is currently available (as determined by the preceding rules) and must indicate whether this group includes any "frozen participants."

Frozen participants are nonexcludable employees with accrued benefits who are not currently benefiting under the plan. A plan must satisfy the nondiscriminatory availability requirements separately with respect to any frozen participants. See line 5., below.

1.401(a)(4)-4(d)(2)

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BRF-Demo 3-Schedule Q instructions-line 4, satisfying the current availability requirement

Introduction

The employer's demonstration must show that the specified BRF satisfies current availability by being currently available to a nondiscriminatory coverage group or by meeting one of the special rules, as described below.

Line 4a-nondiscriminatory group must satisfy either ratio percentage or nondiscriminatory classification

The BRF will satisfy current availability if the employer's demonstration shows that the group of employees to whom the BRF is currently available satisfies section 410(b) without regard to the average benefit percentage test. That is, the group must satisfy the ratio percentage test or the nondiscriminatory classification test.

See Part V for definitions of these terms and for guidance in determining whether one of these tests has been satisfied.

If employer is using QSLOB

Note that if the employer is using the QSLOB rules for purposes of coverage and nondiscrimination, the employer's demonstration that the group of employees to whom the BRF is currently available satisfies section 410(b) must include a demonstration that the availability of the BRF satisfies the gateway test.

Refer to Part II, lines b. and c., for a further discussion of the application of section 410(b) when the employer is using the QSLOB rules.

1.401(a)(4)-4(b)(1)

Line 4b-special rule, prospectively eliminated benefits

If the BRF has been prospectively eliminated with respect to benefits accrued after a certain date, but satisfied section 410(b), as described above, as of the elimination date, it will be treated as satisfying current availability for all periods after the elimination date. Therefore, if the BRF is one that has been prospectively eliminated, the employer's demonstration should be based on the availability of the BRF as of the elimination date.

Defining "prospective elimination"

Note that the regulations contain special rules for determining whether a BRF has been prospectively eliminated, but, generally, a BRF is eliminated with respect to benefits accrued after a given date if the amount or value of the BRF depends solely on the amount of the accrued benefit as of the elimination date (including subsequent

income, etc., in the case of a defined contribution plan).

1.401(a)(4)-4(b)(3)

Line 4c, special rule for mergers and acquisitions

If a BRF is available only to a group of employees who were "acquired" as a result of a merger or acquisition, it may satisfy the current availability requirement under a special rule.

This special rule operates to provide that if the BRF satisfies current availability under the acquiring employer's plan, taking into account all of that employer's nonexcludable employees (including the acquired employees), after the merger or acquisition, it will be treated as satisfying current availability thereafter.

This rule is available if the BRF is available under the employer's plan on the same terms as it was available under the other employer's plan.

Effect of this M&A rule

The effect of this rule is that even though the acquired group of employees may at some point after the merger no longer constitute a nondiscriminatory coverage group, this will not taint the BRF.

Employer needs to demonstrate this M & A rule by providing certain information

If the employer is using this rule, it should demonstrate that as of a date selected by the employer as the last date by which employees can come into the acquired group, the BRF satisfies the ratio percentage or nondiscriminatory classification test, taking into account all the employer's nonexcludable employees.

M&A Cite

1.401(a)(4)-4(d)(1)

Line 4d, Spousal information

If the employer is permissively aggregating plans for purposes of coverage and nondiscrimination (see Part V), any QJSA, QPSA, or required spousal death benefit (under plans exempt from the QJSA requirement) in the aggregated plan is generally treated as satisfying the nondiscriminatory availability requirements and a demonstration of actual availability is not necessary. This rule does not apply to subsidized benefits under a defined benefit plan.

1.401(a)(4)-4(d)(5)

BRF-Demo 3-Schedule Q instructions-line 4, satisfying the current availability requirement, continued

Line 4e, ESOPs

Demonstrations of actual availability are not required in the case of certain diversification rights, distribution options, or restrictions that apply to ESOPs. BRFs arising from these rights, options, and restrictions are treated as satisfying the nondiscriminatory availability requirements.

1.401(a)(4)-4(d)(6)

Line 4f, DB/DC Plans

If the employer is permissively aggregating defined benefit and defined contribution plans (see Part IV concerning DB/DC plans), a BRF that is provided only under the DB plan(s) or only under the DC plan(s) in the DB/DC plan is deemed to satisfy current availability if it is currently available to all NHCEs in all plans of that type.

However, this special rule does not apply to the following types of BRFs: single sum benefits, loans, ancillary benefits, and benefit commencement dates(including the availability of in-service withdrawals).

1.401(a)(4)-9(b)(3)

BRF-Demo 3-Schedule Q instructions-line 4, satisfying the current availability requirement for frozen participants

If BRF is provided to frozen participants

If the employer has indicated that the BRF is provided to frozen participants, it must separately demonstrate that it satisfies the nondiscriminatory availability requirement with respect to these participants.

Special rule for satisfying current availability

Special rules apply to determine that this requirement is met. One rule provides that the BRF will satisfy availability if there has been no change in the current plan year with respect to its availability to any frozen participant.

If special rule is not met

Even if this rule is not met, the BRF will still pass if:

1) the employer's demonstration shows that the change in

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availability has been made in a nondiscriminatory manner,

2) the group of frozen participants to whom the BRF is available constitutes a nondiscriminatory coverage group (taking into account all nonexcludable employees), or

3) the group of employees to whom the BRF is available continues to constitute a nondiscriminatory coverage group when the frozen participants are counted as currently benefiting employees.

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Part VII – Past Service and Service Crediting

Line A – Past service credit and nondiscrimination

Timing of plan amendment must not discriminate in favor of HCEs

A plan will not satisfy section 401(a)(4) if the timing of plan amendments, including amendments granting past service credit, have the effect of discriminating significantly in favor of highly compensated employees.

For this purpose, a plan amendment includes establishment and termination.

Scope of past service credits

Past service credits include:

1. Benefits attributable to service prior to the time a new plan is in effect.
2. Increases in existing benefits resulting from an employee's service prior to the effective date of a plan amendment.
3. Benefits attributable to service with another employer that may be taken into account in accordance with line b.

Facts and circumstances to determine if past service significantly discriminates

Whether the granting of past service significantly discriminates is generally a question of relevant facts and circumstances.

These include the:

- relative numbers of HCEs and NHCEs affected,
- their relative service and accrued benefits, and
- turnover.

Also relevant are the relative benefits of employees and former employees who are not affected by the grant of past service but who would have been had the plan or amendment been in effect during the period for which past service credit is granted.

Conditions for past service credit to be deemed nondiscriminatory

A plan amendment granting past service credit is deemed not to discriminate significantly in favor of highly compensated employees if the following conditions are satisfied:

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1. the period for which the credit is granted does not exceed the 5 years immediately preceding the year in which the amendment first becomes effective,

2. the grant applies on a reasonably uniform basis to all employees,

3. the credit is determined under the current plan formula,

4. the service is service with the employer or a previous employer that may be taken into account under line b., and

5. the amendment is not part of a pattern of amendments that discriminates in favor of HCEs or former HCEs.

Information needed to be provided on Demo 7

When the employer submits a determination letter request, the employer may request a determination regarding past service provisions. The employer should also attach a description of the nature of the past service, identifying the relevant plan provisions. This should be labeled Demo 7.

Specialist may ask employer to demonstrate amendment is nondiscriminatory

If there is a concern that the plan may not satisfy this requirement with respect to the granting of past service credit on establishment or amendment of the plan, the specialist may ask the employer to demonstrate that the timing of the amendment (or establishment of the plan) does not significantly discriminate in favor of HCEs.

1.401(a)(4)-5(a)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Service-Crediting Under the Plan

Definition of Service-crediting and each service crediting must be nondiscriminatory

A plan must be nondiscriminatory with respect to the manner in which service is credited under the plan. For this purpose service-crediting means service credited for each purpose under the plan, including:

- benefit service,
- accrual service,
- vesting service, and
- eligibility service,

and the nondiscrimination requirement must be separately satisfied for each purpose.

Whether nondiscriminatory is based on facts and circumstances determination

Whether the manner in which the plan credits service is nondiscriminatory is a facts and circumstances determination.

However, the manner in which service is credited for a particular purpose will be deemed to be nondiscriminatory if each combination of service-crediting provisions applied for that purpose would satisfy the nondiscriminatory availability requirements if that combination were an other right or feature.

Pre-service employment periods generally disregarded for amounts testing

Generally, service for periods in which an employee did not perform services for the employer or in which the employee did not participate in the plan may not be taken into account in determining whether the nondiscrimination in amount requirement (see Parts X and XI) or the nondiscriminatory availability requirement (see Part VI) are satisfied, although the crediting of any service required by other qualification rules (e.g., section 411(a)) will not cause the plan to fail to satisfy this requirement.

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Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Line B – Service-Crediting Under the Plan, Continued

Three Exceptions to general rule

There are several exceptions to this general rule.

First exception -- past service that satisfies line A

First, past service that satisfies line a. may be taken into account.

For this purpose, past service is service for periods in which service was performed for the employer and in which the employee did not participate in the plan but would have had the plan (or the amendment extending coverage to the employee) been in existence.

Second exception – pre-participation service

Second, pre-participation service that meets certain requirements described below may be taken into account.

Pre-participation service means years of service with the employer or a prior employer for periods before the employee commenced or recommenced participation in the plan, other than past service.

Third exception- imputed service

Third, imputed service that meets the requirements described below may be taken into account.

Imputed service is any service credited for periods after the employee commenced participation in the plan while the employee is not performing services as an employee of the employer or while the employee is on a reduced work schedule but receiving service credit that would not otherwise be credited under the general terms of the plan.

Requirements to take into account pre-participation or imputed service

In order to be taken into account for purposes of nondiscrimination in amount or nondiscriminatory availability, pre-participation or imputed service must be provided under provisions that apply to all similarly situated employees and must be provided for legitimate business reasons.

In addition, the provision must not by design or operation discriminate significantly in favor of highly compensated employees. This is a facts and circumstances determination.

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Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Service-Crediting Under the Plan, Continued

Service-Crediting Information needed to be provided on Demo

If a determination is requested regarding pre-participation or imputed service, the employer is required to describe the nature of the service, to indicate whether it is being taken into account for purposes of nondiscrimination in amounts testing (see Parts X and XI), and to identify the relevant plan provisions. This information should be labeled Demo 7.

If it is determined that the manner in which the plan credits service may be discriminatory, the employer may be asked to provide a demonstration that this requirement is satisfied.

Service Crediting - Cite

1.401(a)(4)-11(d)

Line B – Service-Crediting Under the PlanPast Service

Timing of plan amendments

The timing of a plan amendment that credits (or increases benefits attributable to) years of service for a period in the past may also have the effect of discriminating significantly in favor of highly compensated employees. An amendment will be deemed to not have the effect of discriminating in favor of highly compensated employees if:

1. The period for which the service credit is granted does not exceed the five years immediately preceding the year in which the amendment first becomes effective,

2. The service credit is granted on a reasonably uniform basis to all employees,

3. Benefits attributable to the period are determined by applying the current plan formula, and

4. The service credited is service (including pre-participation or imputed service) with the employer or a previous employer that may be taken into account under the above service crediting rules.

This safe harbor is not available if the plan amendment granting the service credit is part of a pattern of amendments that has the effect of discriminating significantly in favor of highly compensated employees or former highly compensated employees. 1.401(a)(4)-5(a)(3)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part VIII – Other Nondiscrimination Requirements

Line A – Restriction of Benefits and Distributions

Restriction of benefits and distributions

All defined benefit plans must include provisions restricting benefits and distributions to avoid discrimination that may occur in the event of an early termination of the plan. The provisions that the plan must include are the following:

1. Nondiscriminatory benefit

The plan must provide that, in the event of early termination, the benefit of any highly compensated employee or former highly compensated employee is limited to a benefit that is nondiscriminatory under section 401(a)(4).

2. Restrictions for top 25 highly compensated employees

The plan must provide that distributions made to any participant in a group that includes the top 25 most highly compensated current and former employees (restricted employees) is restricted to an amount that is not more than the amount that would be paid to the individual under a straight life annuity that is the actuarial equivalent of the employee's accrued benefit and any other benefits under the plan (other than a social security supplement), plus the amount of any social security supplement the participant is entitled to receive.

Exception to this restriction

This restriction does not apply if:

a) after payment of the benefit to the restricted employee, the value of plan assets equals or exceeds 110 percent of the value of current liabilities as defined in section 412 (l) (7) ,

b) the value of the benefits for the restricted employee is less than 1 percent of the value of current liabilities before distribution, or

c) the value of the restricted employee's benefits does not exceed $5,000.

Rev. Rul. 92-76 -- exception to these restrictions if certain requirements

Rev. Rul. 92-76, 1992-1 C.B. 76, holds that distributions of amounts that would otherwise exceed the new restrictions may be made provided the plan requires adequate security to guarantee any repayment of the restricted amount upon termination.

For this purpose, the restricted amount is the excess of the

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans are met

"accumulated amount" of distributions to an employee over the "accumulated amount" of the payments that would have been paid under the restriction in paragraph 2, above. An "accumulated amount" is the amount of a payment increased by a reasonable rate of interest from the date of payment to the date of determination of the restricted amount.

Examples of plan provisions requiring adequate security are provisions that require an employee, at the time of distribution, to deposit in escrow property with a fair market value of at least 125% of the restricted amount or to post a bond or letter of credit in an amount equal to at least 100% of the restricted amount.

Cites **1.401(a)(4)-5(b), Rev. Rul. 92-76**

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Other nondiscrimination requirements, Line B - Vesting

The vesting of benefits cannot discriminate in favor of HCEs -- facts and circumstances tests

A qualified plan may not discriminate in favor of HCEs in the manner in which employees vest in their accrued benefits under a plan. This is a facts and circumstances determination.

For this purpose, the vesting schedules in sections 411(a)(2)(A) (five-year cliff) and (B) (three-to-seven-year graded) are treated as equivalent to each other. The two top heavy minimum vesting schedules are also treated as equivalent to each other.

The manner in which employees vest is deemed to be nondiscriminatory if each combination of plan provisions affecting nonforfeitability would satisfy the nondiscriminatory availability requirements if it were an other right or feature.

1.401(a)(4)-11(c)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Other nondiscrimination requirements Line C – Former Employees

Overview

A qualified plan must also satisfy the nondiscriminatory amount and availability requirements with respect to former employees. However, this requirement is generally relevant only in the case of benefits provided through an amendment that is effective in the plan year.

Line C(i): Nondiscrimination in amount requirement -- facts and circumstances

A plan will satisfy the nondiscriminatory amount requirement with respect to former employees if, based on all the facts and circumstance, the amounts of contributions or benefits provided to former employees do not discriminate significantly in favor of HCEs. A plan under which no former employee currently benefits is deemed to satisfy this requirement.

Thus, only amendments to defined benefit plans adjusting former employees' benefits (e.g. COLA adjustments) are taken into account.

Permitted disparity rules under 401(l) and 401(a)(4) apply for the nondiscrimination in amounts requirement

In making the determination of whether the amount of contributions or benefits provided to former employees discriminates significantly in favor of former HCEs, the rules of section 401(l) and the corresponding imputed disparity rules under section 401(a)(4) apply.

Thus, in determining a former employee's cumulative disparity limit, the employee's annual disparity fractions as an employee must be taken into account. In addition, a former employee's permitted disparity rate is determined as of the age benefits commence, not when the employee receives the accrual for the current plan year.

Where an amendment increasing benefits for former employees in pay status (including former HCEs) increases the disparity in the plan's benefit formula beyond the maximum permitted disparity adjusted for any reasonable approximation of the increase in the cost of living since the former employees commenced receiving benefits, the amendment will result in significant discrimination in favor of former HCEs.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Other nondiscrimination requirements Line C – Former Employees, Continued

Employer may need to provide information with respect to HCEs and NHCEs benefiting

Specialists may need to ask employers to show the relative numbers of HCEs and NHCEs who benefit as the result of a plan amendment where the amendment may cause the contributions or benefits under the plan to discriminate significantly in favor of former HCEs. For example, an amendment that increases the benefits of only those former employees in pay status who terminated employment after attaining early retirement age may be likely to benefit relatively more former HCEs than former NHCEs and a request for a demonstration from the employer would be appropriate.

Line C(ii) - Nondiscrimination in availability of BRFs-facts and circumstances analysis

A plan will satisfy the nondiscriminatory availability requirement with respect to benefits, rights, and features provided to former employees if any change in the availability to any former employee is applied in a manner that, based on all the facts and circumstance, does not discriminate significantly in favor of HCEs.

If there is a question as to whether the plan may fail to satisfy these requirements, the specialist may request a demonstration from the employer.

1.401(a)(4)-10

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part IX – Floor-Offset Safe Harbor Testing

Whether plan contains a floor-offset arrangement

If the plan is a defined benefit plan that offsets the participant's accrued benefit by the value of the participant's account balance under another plan of the employer, the specialist should determine if the plans are part of a floor offset arrangement that is intended to satisfy the requirements of the safe harbor testing method in the regulations.

Impact of meeting safe harbor

This safe harbor allows the defined benefit plan to satisfy the unit credit safe harbor (see Part XI, below) or the general test for nondiscrimination in amounts (see Part X, below), disregarding the offset to the benefit. Consequently, whether the plan is part of such an arrangement will affect the determination of whether the plan satisfies the nondiscrimination requirements

Information to be provided for Demo 8

If a determination is requested regarding a floor-offset arrangement the employer must provide the name, EIN, and plan type of the other plan. The employer must also indicate whether the other plan has received a determination letter or is being submitted simultaneously. This information should be labeled Demo 8.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Part IX – Floor-Offset Safe Harbor Testing, Continued

7 ways for floor-offset arrangement to satisfy safe harbor testing method

A floor-offset arrangement will satisfy the safe harbor testing method if:

1. under the arrangement, the accrued benefit under the defined benefit plan is reduced solely by the actuarial equivalent of all or part of the employee's employer-derived account balance (including prior distributions) under a defined contribution plan of the same employer, determined using an interest rate no greater than 8.5 percent;

2. nonforfeitable benefits are offset only by other nonforfeitable benefits;

3. the defined benefit is noncontributory, unless employee contribution feature has been discontinued;

4. the same employees benefit under both plans and the offset is applied to all employees on the same terms;

5. the same options with respect to investments and preretirement distributions must be available to all employees under the defined contribution plan;

6. the defined benefit plan must satisfy the uniformity and unit credit safe harbor requirements described in Part XI on a gross benefits basis and the defined contribution plan must satisfy any safe harbor or the general test, or the defined contribution plan must satisfy the uniform allocation formula in Part X of Worksheet 5 and the defined benefit plan must satisfy any safe harbor or the general test on a gross benefit basis; and

7. the defined contribution plan must not be a section 401(k) or section 401(m) plan.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part IX – Floor-Offset Safe Harbor Testing, Continued

Regs. exception allows for section 401(k) or 401(m) to be part of floor-offset arrangement	An exception in the regulations allows certain arrangements described in section 1165(f)(5) of TRA of 1986 to satisfy these requirements even though a section 401(k) or section 401(m) plan is part of the arrangement. If the employer has indicated that the plan is part of such an arrangement, the specialist should determine that these requirements are satisfied as this determination will affect the subsequent review of the plan. If necessary, the employer may be asked to furnish the other plan.
Part IX - Cite	**1.401(a)(4)-8(d)**

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part X – Nondiscriminatory Contributions or Benefits

Overview

- This part of the worksheet deals with the requirement of the regulations under section 401(a)(4) that a plan be nondiscriminatory with respect to the amount of contributions or benefits under the plan.

- A plan can satisfy the requirement that it be nondiscriminatory with respect to the amounts of contributions or benefits under the plan in two ways.

- First, this requirement will be satisfied if the plan satisfies a general test that compares the actual accrual or allocation rates of highly compensated and nonhighly compensated employees under the plan.

- Second, the requirement will be satisfied if the plan satisfies a nondiscrimination safe harbor.

- Generally, the safe harbors operate to allow plans to meet the nondiscrimination in amount requirement without actually comparing accrual or allocation rates. These types of safe harbors are referred to as "design-based." However, there are two safe harbors that merely simplify the process of comparing accrual or allocation rates, without eliminating the need to do so. These are referred to as "nondesign-based" safe harbors.

1.401(a)(4)-1(b)
1.401(a)(4)-2(a)
1.401(a)(4)-3(a)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Nondiscriminatory Contributions or Benefits, Line A – Design-based Safe Harbor

Employer may indicate whether they intend to satisfy nondiscrimination in amount requirement through design-based safe harbor

When an employer submits a determination letter application, the employer may indicate whether the plan is intended to satisfy the requirement that it be nondiscriminatory in amount by meeting one of the design-based safe harbors under the section 401(a)(4) regulations. (In the case of a Form 5310, the employer is generally required t indicate which nondiscrimination test the plan satisfies and provide the appropriate information.

A design-based safe harbor allows for a determination that the plan, by design, satisfies the nondiscrimination in amount requirement without the need to test the actual allocations or benefits under the plan. If the plan is not intended to satisfy a design-based safe harbor, the employer is given the option of receiving a caveated letter or demonstrating that a general test or a nondesign-based safe harbor is satisfied.

Do not complete this part if the employer has indicated that the plan satisfies a design-based safe harbor. Instead, skip to Part XI.

If plan is not a design-based safe harbor

If the plan is not a design based safe harbor plan, the remaining Parts of the worksheet are generally not applicable. However, the explanations for these parts of the worksheets may contain information that is relevant to the determination of whether a plan satisfies a general test or a nondesign-based safe harbor or the average benefits test. In addition, Part XIII of the worksheet, relating to nondiscriminatory compensation, should be completed in the case of a section 401(m) plan that is required to demonstrate that the definition of compensation used in the plan's ACP test is nondiscriminatory.

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Nondiscriminatory Contributions or Benefits, Line B – General Test

Demo 6 used to request determination that general test is satisfied

If the employer has requested a determination that the plan satisfies a general test, the employer is required to submit a demonstration that the test is met. This demonstration should be labeled Demo 6.

A special rule in the regulations provides that under certain circumstances a defined benefit plan that would otherwise fail to satisfy the general test will be considered to satisfy the test if the facts and circumstances warrant such a determination. Employers that are requesting application of this special rule are required to so indicate in their applications and should include with their demonstration a description of the relevant facts and circumstances supporting application of this rule. See the appendix in Explanation 5C to determine if the plan satisfies a general test.

1.401(a)(4)-3(c)(3)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line C – Nondesign-based Safe Harbor

Demo 6 also used to request determination that plan satisfies alternative safe harbor for flat benefit plans

If the employer is requesting a determination that the plan satisfies the alternative safe harbor for flat benefit plans, the employer is required to submit a demonstration that the safe harbor is satisfied. This demonstration should be labeled Demo 6. The instructions for Schedule Q (Form 5300) contain guidelines that employers should generally follow in preparing this demonstration.

A defined benefit plan will satisfy the alternative safe harbor for flat benefit plans if it meets two requirements.

First requirement: fractional rule flat benefit safe harbor

First, the plan must satisfy the fractional rule flat benefit safe harbor described in line XI.a.(iii) of the worksheet, other than the requirement that at least 25 years of service are required to receive the unreduced flat benefit. Therefore, the specialist must first determine that the requirements described in

a) line XI.a. (relating to general defined benefit safe harbor uniformity requirements);

b) line XI.a.(iii) (relating to the fractional rule flat benefit safe harbor), other than the 25 year requirement; and

c) line XI.b. of the worksheet (relating to fresh-start requirements) are satisfied.

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Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Line C – Nondesign-based Safe Harbor, Continued

Second requirement

Second, for the plan year, the average of the normal accrual rates for all nonhighly compensated nonexcludable employees must be at least 70 percent of the average of the normal accrual rates for all highly compensated nonexcludable employees.

(See Part V for the definition of excludable employee.)

All nonexcludable employees are taken into account, regardless of whether they benefit under the plan.

Thus, the normal accrual rates for each employee in the two groups must be separately determined and then an average for all employees in each group is determined. The employer is not required to submit information regarding individual normal accrual rates, merely the average rates for the groups of highly compensated and nonhighly compensated nonexcludable employees.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Line C – Nondesign-based Safe Harbor, Continued

Information required in demonstration

In providing a demonstration of this safe harbor, employers should include with their demonstrations certain information regarding how normal accrual rates have been determined. The concept of normal accrual rate and the manner in which this rate is determined are relevant to the general tests. Therefore, the specialist should refer to the first part of the appendix in Explanation 5C (pertaining to the general test) in evaluating this information. In general, all of the information contained in the appendix pertaining to the general test also has application to the determination of normal accrual rates for the alternative safe harbor for flat benefit plans, except for information pertaining to the following:

a. the determination of most valuable accrual rate;

b. the grouping of accrual rates;

c. the identification and section 410(b) testing of rate groups;

d. testing on the basis of contributions; and

e. the application of the special rule in section 1.401(a)(4)-3 (c)(3) of the regulations.

Nondesign-based harbor – Cite

1.401(a)(4)-3(b)(4)(i)(C)(3)

Part XI – Design-Based Safe Harbor

Overview

This part of the worksheet deals with the design-based safe harbors and should be completed if the employer has indicated that the plan is intended to satisfy such a safe harbor. A design-based safe harbor allows for a determination that the plan, by design, satisfies the nondiscrimination in amount requirement without the need to test the actual allocations or benefits under the plan. The employer is asked to specify the particular safe harbor that the plan is intended to satisfy. Those lines of the worksheet that do not pertain to the specified safe harbor should not be completed.

The remaining parts of the worksheet (XII through XIII) generally should be completed only in the case of design-based safe harbor plans. However, some of the requirements addressed in these parts of the worksheet may be relevant to a determination of whether a plan satisfies a general test or a nondesign-based safe harbor or the average benefit test.

In addition, Part XIII of the worksheet, relating to nondiscriminatory compensation, should be completed in the case of a section 401(m) plan that is required to demonstrate that the definition of compensation used in the plan's ACP test is nondiscriminatory.

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line A – Uniformity Requirements and Safe Harbors

Uniformity requirements

In order to satisfy any of the defined benefit safe harbors, a defined benefit plan must generally satisfy the following uniformity requirements:

1. Uniform Normal Retirement Benefit

All employees in the plan are subject to the same benefit formula providing the same annual benefit payable in the same form commencing at the same uniform normal retirement age. Under the formula, the annual benefit is the same percentage of average annual compensation or the same dollar amount for all employees with the same years of service at NRA.

(In the case of an employee continuing in service past NRA, the employee's benefit at any later age must equal the benefit (as a percentage of average annual compensation or as a dollar amount) payable to an employee commencing to receive benefits at NRA with the same number of years of service.)

Because social security retirement age (SSRA) is a uniform retirement age under section 401(a)(5)(F), differences in employees' benefits that are attributable solely to differences in such employees' SSRAs will not cause a plan to fail to be a safe harbor plan

Compensation formula

If the benefit formula is based on average annual compensation, the compensation formula must be uniform for all employees and nondiscriminatory under section 414(s) (see Part XIII), and the formula must base benefits on a period of at least three consecutive 12-month periods, or the participant's entire period of service if shorter, during which the employee's average section 414(s) compensation was the highest. (If the plan does not provide for permitted disparity and does not base average compensation, for purposes of calculating benefits on consecutive 12-month periods, the "consecutive" requirement for average annual compensation does not apply.)

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Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Line A – Uniformity Requirements and Safe Harbors, Continued

What periods may be disregarded in determining average annual compensation

In making the determination of average annual compensation, the plan must look to the employee's compensation history for a continuous period that ends in the current plan year and is no shorter than the averaging period. The plan can disregard 12-month periods in which the employee terminates employment, performs no service, or performs service for a number of hours that is less than a number of hours specified by the employer (not to exceed 3/4 of full time hours for the 12-month period.) Similar rules allow months to be disregarded when average annual compensation uses 12-month periods that do not end on a fixed date, such as the 60 consecutive months producing the highest average.

Uniformity rules for accumulation plan (career average plan)

If the plan is an accumulation plan, it may use plan year compensation instead of average annual compensation. An accumulation plan (also referred to as a career average plan) separately calculates the compensation and benefit each year and then totals the benefit. Plan year compensation is section 414(s) compensation for the plan year or a 12-month period ending within the plan year. For the year in which participation in the plan begins or ends, the plan may limit plan year compensation to the period of participation provided the plan year is also the period for determining accruals and the use of period of participation is done in a nondiscriminatory and reasonably consistent manner from year to year.

2. Uniform subsidies

All subsidized optional forms of benefit under the plan (other than those that have been prospectively eliminated) are available to substantially all employees in the plan, determined using current availability criteria. (A plan that provides an early retirement window benefit may fail this requirement. However, in this case it may be possible to restructure the plan so that each restructured component separately satisfies this and the other safe harbor requirements.)

3. Contributory plans

If the plan is a contributory plan, it meets the requirements in Part XII of the worksheet.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Line A – Uniformity Requirements and Safe Harbors, Continued

4. Period of accrual	The years of service over which the benefit accrues are the same as those taken into account under the plan's benefit formula.

Uniformity requirements - Cites	**1.401(a)(4)-3(b)(2) and (6)** **1.401(a)(4)-3(e)**

Continued on next page

Use of safe harbors not precluded by certain plan provisions

A plan will not fail to satisfy a safe harbor merely because:

1. The plan provides for permitted disparity in a manner that satisfies section 401(l) and Worksheet 5B.

2. Accruals are limited in accordance with section 415 or the plan provides for increases in accrued benefits based solely on adjustments to the dollar limit under section 415(b)(1).

3. Accruals are limited to a maximum dollar amount or a maximum percentage of compensation, or the amount of compensation or service taken into account is limited, provided these limits apply uniformly to either all employees or only to some or all highly compensated employees.

4. Employees receive reduced accruals for less than a full year of service of participation.

5. The plan has one or more entry dates during the plan year.

6. The plan determines benefits for service after a fresh--start date for all employees under a benefit formula or accrual method that differs from the formula or method previously used to determine benefit accruals for employees in a fresh-start group for service before the fresh-start date, provided the plan satisfies the fresh-start rules in the regulations (see explanation line XI.b.). This, for example, allows a non-safe harbor plan to transition into a safe harbor.

7. The plan provides that an employee's benefit is the greater of, or the sum of, two or more formulas each of which satisfies the safe harbor. Formulas that are available solely to some or all nonhighly compensated employees, but not available to any highly compensated employees, fall within this exception, as do the following types of top-heavy formulas: formulas available solely to all non-key employees on the same terms as other formulas and formulas conditioned on the plan being top-heavy.

Continued on next page

Use of safe harbors not precluded by certain plan provisions (continued)

8. The plan provides benefits to highly compensated employees that are inherently less valuable than the benefits provided to nonhighly compensated employees.

9. The plan provides a subsidized optional form of benefit that is available to fewer than substantially all employees because the optional form of benefit has been eliminated prospectively.

1.401(a)(4)-3(b)(6)

Special rules

Certain other special rules may have application to particular plans intended to satisfy a safe harbor. Among these are the following:

1. Early Retirement Window Benefits

If the plan provides an early retirement window benefit that consists of a temporary change in the plan's benefit formula (i.e., with respect to those electing to retire during the window), the plan must satisfy the safe harbor requirements both taking the temporary change into account and disregarding it. If such a provision is encountered, the specialist should refer to the example in section 1.401(a)(4)-3(f)(4)(iv) of the regulations that shows how a plan may be restructured to satisfy this requirement.

2. Accruals after normal retirement age

If the plan provides for increases in an employee's accrued benefit solely because of a delay past NRA in commencement of benefits, the increase may be disregarded if the increase factor (percentage) is no greater than the percentage that would be obtained using a standard mortality table and an interest rate between 7.5 percent and 8.5 percent, compounded annually. Thus, where a plan that satisfies all the other safe harbor requirements provides such an increase and offsets the post-NRA accrual by the increase, both the increase and the offset may be disregarded so that the plan will continue to satisfy the safe harbor.

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Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Line A – Uniformity Requirements and Safe Harbors, Continued

3. Floor-offset arrangement: General rule

If the benefits under the defined benefit plan are offset by benefits under another plan, two rules that may allow the offset to be disregarded so that the plan may still satisfy a safe harbor. First, if the requirements of the floor-offset safe harbor described in Part IX of the worksheet are satisfied, the offset to the accrued benefit that would otherwise be provided under the defined benefit plan is disregarded in determining whether the plan satisfies a safe harbor. Under this safe harbor, the permitted offset is the actuarial equivalent of all or part of the account balance attributable to employer contributions under a defined contribution plan maintained by the same employer. If the employer indicates that the plan is part of a floor-offset arrangement, Part IX of the worksheet should also be completed.

Floor-offset arrangement: Alternate rule

If the plan includes an offset provision and the requirements of the floor-offset safe harbor are not satisfied, a second rule may operate to allow the disregard of the offset. This rule provides that the employee's accrued benefit includes that portion of the benefit that is offset, provided the benefit by which the plan benefit is being offset is attributable to periods for which the plan credits pre-participation or past service and the offset provision applies on the same basis for all similarly-situated employees. See Part VII of the worksheet.

In addition, the offset must be for benefits under a qualified DB or DC plan (whether or not terminated), or for benefits under a foreign plan that are reasonably expected to be paid.

Finally, nonforfeitable benefits may be offset only by other nonforfeitable benefits.

4. Multiemployer plan

If the plan is a multiemployer plan that includes a requirement to complete up to five years of future service in order to be entitled to an increase in benefits for prior service, this requirement may be disregarded if the requirement applies to all employees in the plan.

Special Rules – Cites

1.401(a)(4)-3(f)
1.401(a)(4)-8(d)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line A(i) – Unit Credit Safe Harbor

Two-prong test to satisfy unit credit safe harbor

A plan will satisfy the unit credit safe harbor if it meets the following requirements:

1. The plan satisfies the 133 1/3 percent accrual rule (see Alert Guidelines 2A).

2. Under the plan, each employee's accrued benefit, as of any plan year, is determined by applying the plan's benefit formula to the employee's years of service and average annual compensation (if applicable) for that plan year.

1.401(a)(4)-3(b)(3)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Line A (ii) – Fractional Rule Unit Credit Safe Harbor

Three-prong test to satisfy fractional rule unit credit safe harbor

A plan will satisfy the fractional rule unit credit safe harbor if it meets the following requirements:

1. The plan satisfies the fractional accrual rule (see Alert Guidelines 2A).

2. Under the plan, each employee's accrued benefit, as of any plan year before NRA, is determined by multiplying the fractional rule benefit by this fraction: years of service as of the plan year over years of service projected to NRA.

3. Under the plan, no employee can accrue, in any one year, a part of the normal retirement benefit that is more than one third larger than the benefit that any other employee (or potential employee) could accrue, disregarding employees with projected service of more than 33 years at NRA. Solely for the purpose of this requirement, a plan that provides for permitted disparity may treat participants as having received benefits on all compensation at the excess rate or at the rate prior to application of the offset so that the disparity alone does not cause the plan to fail to meet this requirement. If the plan's unit credit benefit formula does not limit the service taken into account to less than 25 years of credited service, and the formula does not provide for a rate increase after a specified number of years of participation, the plan will satisfy this requirement because 33 years does not exceed 133 1/3 percent of 25 years.

1.401(a)(4)-3(b)(4)(i)(C)(1)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line A(iii) – Fractional Rule Flat Benefit Safe Harbor

Requirements to satisfy fractional rule flat benefit safe harbor

A plan will satisfy the fractional rule flat benefit safe harbor if it meets the following requirements:

1. The plan satisfies the fractional accrual rule (see Alert Guidelines 2A).

2. Under the plan, each employee's accrued benefit, as of any plan year before NRA, is determined by multiplying the fractional rule benefit by this fraction: years of service as of the plan year over years of service projected to NRA.

3. The plan provides a flat benefit at normal retirement age as a percentage of average annual compensation or a flat dollar amount (e.g., 50 percent of average annual compensation) that is the same for all employees in the plan who have a minimum number of years of service at NRA, with a pro rata reduction in the benefit for employees with less than that minimum number of years of service at NRA. (The definition of years of service for this fraction and for the benefit formula must be the same; e.g., the plan cannot use years of service (including pre-plan participation service) for the benefit formula and years of participation for the accrual.)

4. The plan requires at least 25 years of service at NRA for the unreduced flat benefit, determined without regard to the section 415 limitations.

This safe harbor operates to ensure that no employee can accrue the maximum benefit at a rate faster than four percent a year. However, a plan may be designed so that the maximum section 415 benefit accrues over less than 25 years. This is done by having the plan provide for a benefit in excess of the section 415 limits, limiting the accrual of that benefit to four percent a year, and capping the participant's accruals at the section 415 limits.

1.401(a)(4)-3(b)(4)(i)(C)(2)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Line A(iv) – Insurance Contract Plan Safe Harbor

Requirements to satisfy insurance contract safe harbor

A defined benefit plan will satisfy the safe harbor for insurance contract plans if it meets the following requirements:

1. The plan satisfies the accrual rule of section 411(b)(1)(F) (see Alert Guidelines 2A).

2. The plan is an insurance contract plan within the meaning of section 412(i) (see below).

3. The benefit formula under the plan would satisfy the fractional rule unit credit or flat benefit safe harbor if the stated normal retirement benefit accrued ratably over each employee's period of plan participation through normal retirement age. The plan's benefit formula may not recognize years of service prior to plan participation unless the plan was adopted and in effect on September 19, 1991, and then only to the extent then provided in the plan and only to employees who participated on or before that date.

4. Scheduled premium payments under the contract used to fund the employee's retirement benefit are level annual payments to NRA and may not cease before then.

5. Premium payments for an employee who continues to benefit after NRA equal the amount necessary to fund additional benefits that accrue for the plan year.

6. Dividends and forfeitures, etc., are used solely to reduce future premiums.

7. All benefits are funded through contracts of the same series (e.g., with cash values based on the same terms, including interest and mortality assumptions, and with the same conversion rights). A change in the series or insurer that applies on the same terms to all employees will not violate this rule.

Disparity must satisfy the permitted disparity regulations (Worksheet 5B for a special adjustment that applies).

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line A(iv) – Insurance Contract Plan Safe Harbor, Continued

412(i) Plan	A 412(i) plan is one funded exclusively by insurance contracts providing for level annual premium payments from participation (or benefit increase) through NRA. Plan benefits equal contract benefits at NRA and are guaranteed by a state licensed insurance carrier to the extent premiums have been paid. Premiums are payable before lapse or there is reinstatement of the policy. No contract rights are subject to a security interest and there are no outstanding policy loans.
Safe harbor for insurance contract plans - Cite	**1.401(a)(4)-3(b)(5)**

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line A(v) – Cash Balance Safe Harbor

Regs. Definition of cash balance plan

A cash balance plan is a defined benefit plan that defines benefits for each employee by reference to the employee's hypothetical account. The rules for this safe harbor are contained in section 1.401(a)(4)-8(c)(3) of the regulations. These regulations incorporate a design-based safe harbor in section 1.401(a)(4)-8(c)(3)(iii)(B). If the employer has indicated that the plan satisfies this design-based safe harbor, the specialist should refer to the regulations to determine that the requirements of the design-based safe harbor as well as the other requirements of section 1.401(a)(4)-8(c)(3) are met. The specialist should also refer to section 1.401(a)(4)-13(f) of the regulations which contains special fresh-start rules.

1.401(a)(4)-8(c)(3)
1.401(a)(4)-13(f)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Fresh-Start Requirements

Fresh-start rules, when applicable, must be met in order to satisfy safe-harbor

In order to satisfy a safe harbor, a defined benefit plan is generally required to provide a uniform normal retirement benefit. See line b. A plan that has a benefit formula and accrual method for service after a given date that is different from the formula and method for service before that date will not fail the safe harbor requirements provided the plan satisfies the fresh-start requirements. Thus, when a defined benefit plan is amended to change its benefit formula or accrual method, benefits that are subsequently accrued under the plan must satisfy the fresh-start rules in order for the plan to satisfy a safe-harbor.

Operation of fresh-start rules

The fresh-start rules operate to freeze the accrued benefit generally as of the last day of the plan year preceding the year in which the new formula or accrual method first applies. (This date is referred to as the fresh-start date and the accrued benefit as of that date is referred to as the frozen accrued benefit. A plan may use a date other than the last day of the plan year as the fresh-start date, provided the plan satisfied a safe harbor from the beginning of the plan year through the fresh-start date, or under certain other circumstances that are described below.) The frozen accrued benefit is then either added to the accruals based on the new formula (or method) as applied to service after the fresh-start date or "worn away" (under one of two methods) by accruals under the new formula as applied to all service.

Definition of fresh-start group

The fresh-start formula generally must apply to all employees with accrued benefits as of the fresh-start date and an hour of service after that date (the "fresh-start group"). However, the fresh-start group may be limited to :

1. section 401(a)(17) employees (see Alert Guidelines #4),

2. members of an acquired group of employees, or

3. employees with frozen accrued benefits attributable to transferred assets and liabilities.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Fresh-Start Requirements, Continued

If limited to acquired group

If the fresh-start is limited to the acquired group, the fresh-start date must be the date selected by the employer as the last date of hire or transfer for employees to be included in the acquired group.

If limited to employees with transferred benefits

If the fresh-start is limited to employees with transferred benefits, the fresh-start date must be the date on which these employees begin accruing benefits under the plan.

Compensation adjustment

The frozen accrued benefit can be increased to comply with the average compensation requirement of section 416(c)(1)(D)(i), or, if the requirements described below are satisfied, to reflect employees' future compensation increases.

1 of 3 formulas must be used

A plan that is required to include a fresh-start formula must contain one of the following formulas for all employees in the fresh-start group:

Without wear away formula

1. Each employee's accrued benefit is equal to the sum of:
   a. the employee's frozen accrued benefit, and
   b. the employee's accrued benefit under the new formula as applied to years of service after the fresh-start date.

This is referred to as the formula "without wear away."

Wear away formula

2. Each employee's accrued benefit is equal to the greater of
   a. the employee's frozen accrued benefit, or
   b. the employee's accrued benefit under the new formula as applied to the employee's total years of service.

This is referred to as the "wear away" formula.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Fresh-Start Requirements, Continued

Extended wear away formula

3. Each employee's accrued benefit is equal to the greater of:

   a. the sum determined under formula 1., above or
   b. the amount described in line b. of formula 2., above

This is referred to as the "extended wear away" formula.

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Fresh-start Requirements – Compensation Adjustments to Frozen Accrued Benefits

Adjustments to participant's frozen accrued benefit

A plan may adjust a participant's frozen accrued benefit in the preceding formulas to take into account compensation increases after the fresh-start date provided the following conditions are satisfied:

Condition #1

1. The plan's benefit formula as of the fresh-start date must have provided for the pre-fresh-start accrued benefits of the employees in the fresh-start group to be adjusted for later compensation (e.g., final average pay plans).

Condition #2

2. The plan's terms must provide that the accrued benefits of each employee in the fresh-start group after the fresh-start date be at least equal to the employee's adjusted accrued benefit (see below).

Condition #3

3. The group of employees with accrued benefits under the plan on the fresh-start date must have satisfied the minimum coverage requirements as of that date.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Fresh-start Requirements – Compensation Adjustments to Frozen Accrued Benefits, Continued

Condition #4

4. The fresh-start group must satisfy one of the following requirements:

a. it must satisfy the minimum coverage requirements for all years from the first year beginning after the fresh-start date through the current year;

b. it must have satisfied the minimum coverage requirements for the first five years beginning after the fresh-start date;

c. it must have satisfied the ratio percentage test as of the fresh-start date;

d. it must have consisted of an acquired group that satisfied minimum coverage as of the fresh-start date; or

e. the fresh-start date must have been on or before the effective date of these rules (generally the first day of the 1994 plan year).

Condition #5

5. The plan must provide benefit accruals (other than compensation increases to pre-fresh-start accrued benefits) to the fresh-start group at a rate that is meaningful in comparison to the rate of accrual for the fresh-start group in pre-fresh start years.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Fresh-start Requirements – Compensation Adjustments to Frozen Accrued Benefits, Continued

Condition #6

6. If the plan provides for permitted disparity, it must make the minimum benefit adjustment that is described below. This minimum benefit adjustment ensures that the benefit in the fresh-start formula satisfies the 2 to 1 rule of section 401(l).

The adjustment is not needed if the frozen accrued benefit already satisfies section 401(l).

(In most situations, the specialist will not be able to determine that some of the requirements described above, particularly those relating to meaningful coverage, have been satisfied. This is because these requirements pertain to the plan's ongoing operation. Consequently, these requirements need not be considered when making a determination of whether a plan satisfies the fresh-start rules.)

Adjusted Accrued benefit: Overview

If the plan meets the foregoing requirements, it may substitute for the frozen accrued benefit in the fresh-start formulas the "adjusted accrued benefit." The adjusted accrued benefit is determined as follows:

First step in determining Adjusted Accrued benefit

First, if the plan provides for permitted disparity as of the fresh-start date, make the following adjustment, if necessary:

a. in an excess plan, adjust the employee's frozen accrued benefit so that the base benefit percentage is not less than 50 percent of the excess benefit percentage; or

b. in a PIA offset plan, adjust each employee's offset so that it does not exceed 50 percent of the benefit determined before the offset.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Fresh-start Requirements – Compensation Adjustments to Frozen Accrued Benefits, Continued

Second step in determining Adjusted Accrued benefit

Second, multiply the frozen accrued benefit (as adjusted in the first step, if applicable) by the following fraction (not less than one) :

$$\frac{\text{the employee's compensation for the current plan year}}{\text{the employee's compensation as of the fresh-start date (determined under the same definition)}}$$

Compensation must either be the definition used in determining the frozen accrued benefit or average annual compensation.

Pre-1994 plan year : Alternate method permitted to adjust frozen compensation

Where the fresh-start occurs before the effective date of these rules (generally the first day of the 1994 plan year), the plan may use a different method to adjust the frozen compensation. Under this method, the employee's frozen accrued benefit is multiplied by the following fraction (not less than one) :

$$\frac{\text{the employee's average annual compensation for the current year}}{\text{the employee's reconstructed average annual compensation as of the fresh-start date}}$$

Reconstructed Compensation

An employee's "reconstructed compensation" is equal to the average annual compensation determined for a pre-1995, post fresh-start date plan year calculated in accordance with the same method which is in effect for the current year, multiplied by a fraction, the numerator of which is the employee's compensation as of the fresh-start date determined under the same compensation definition and formula used to determine the employee's frozen accrued benefit, and the denominator of which is the employee's compensation for the selected post-fresh-start date plan year, determined under the same definition of compensation and formula used to determine the employee's frozen accrued benefit.

Compensation in the above fractions is subject to the annual compensation limit under section 401(a)(17). However, see Alert Guidelines #4 for special rules concerning "section 401(a)(17) employees".

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Fresh-start Requirements – Compensation Adjustments to Frozen Accrued Benefits, Continued

Plug-in method	As an alternative to applying the foregoing fractions to determine an employee's adjusted accrued benefit, the plan may use the following "plug-in" method. Under this method, the plan determines the adjusted accrued benefit by substituting in the benefit formula used to determine the frozen accrued benefit the employee's compensation for the current plan year, determined under the same compensation formula and definition used to determine the frozen accrued benefit. This method may be used only if it is reasonable to expect as of the fresh-start date that, over time, the use of this method rather than the fraction method will not discriminate significantly in favor of HCEs.
Fresh Start - Cite	**1.401(a)(4)-13(c) and (d)**

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part XII – Employee Contributions not Allocated to Separate Accounts, Line A - Safe Harbor on Basis of Employer-Provided Benefit Rates

Overview of safe-harbor

A defined benefit plan that provides for employee contributions not allocated to separate accounts (i.e., a contributory defined benefit plan) will not satisfy a safe harbor unless it would do so if the plan's benefit formula provided benefits at employee's employer-provided benefit rates, as determined under the nondiscrimination regulations. In other words, if the employer-provided benefit would satisfy a safe harbor, the plan will satisfy the safe harbor irrespective of the contributory feature.

Regs. provide five alternative methods

Generally, the employer-provided benefit in a contributory plan is to be determined under the rules in section 411(c). See Alert Guidelines #2A. However, the regulations provide several alternative methods:

1. the composition-of-workforce method
2. the minimum benefit method
3. the grandfather rule
4. the government plan method
5. the cessation of contributions method

The employer should indicate in its application the method it is using. If the plan is a fractional accrual rule safe harbor plan or an insurance contract plan, only the last three methods may be used.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part XII – Employee Contributions not Allocated to Separate Accounts, Line A - Safe Harbor on Basis of Employer-Provided Benefit Rates, Continued

Requirements for above five alternative methods

The requirements of each of these methods are as follows:

1. In order to satisfy the composition-of-workforce method, the employer must demonstrate that certain demographic and other requirements are satisfied. See line b.

2. The minimum benefit requirement is satisfied if all employees make contributions at the same rate of plan year compensation and, for plan years beginning after December 31, 1993, each employee accrues a benefit that equals or exceeds the sum of:

a. The accrued benefit derived from employee contributions made for plan years beginning after December 31, 1993, determined in accordance with section 411(c), and
b. Fifty percent of the participant's total benefit (derived from both employer and employee contributions) accrued in plan years beginning after December 31, 1993 (determined without regard to that portion of the benefit formula designed to satisfy the minimum benefit requirement.)

Note that this is just a minimum benefit. The participant is entitled to his or her vested accrued benefit determined under the plan's benefit formula if greater.

3. The grandfather rule, which applies to certain plans with graded employee contribution that were in existence on May 14, 1990 (as well as certain multiple employer plans), is satisfied if the employer demonstrates that the requirements described in line c. are satisfied.

4. The government plan method applies to any government plan.

5. The cessation of employee contributions method is satisfied if no employee contributions may be made to the plan after the last day of the 1994 plan year.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part XII – Employee Contributions not Allocated to Separate Accounts, Line A - Safe Harbor on Basis of Employer-Provided Benefit Rates, Continued

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The determination of the employer-provided benefit under each of these methods is as follows:

1. Composition-of-workforce. If the plan is not a section 401(l) plan, treat the entire accrued benefit as employer-provided. If the plan is a section 401(l) plan, see Worksheet 5B.

2. Minimum benefit method. If the plan is not a section 401(l) plan, treat the entire accrued benefit as employer-provided. If the plan is a section 401(l) plan, see Worksheet 5B.

3. Grandfather method. Subtract from the total benefit the employee-provided benefit determined under a reasonable method in the plan that conforms to the demonstration described in line c.

4. Government plan method. Treat the entire accrued benefit as employer-provided.

5. Cessation of contributions method. Treat the entire accrued benefit as employer-provided.

1.401(a)(4)-3(b)(6)(viii)
1.401(a)(4)-6(b)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line B – Composition of Workforce Method

Overview

The employer may use the composition-of-workforce method to determine the employer-provided benefit if employee's make contributions at the same rate (percentage of plan year compensation) and the employer submits a demonstration that the plan satisfies certain demographics requirements. This should be labeled Demo 10. If the employer provides such a demonstration, the specialist should refer to section 1.401(a)(4)-6(b)(2)(ii)(B)(2) and (3) to determine that either the minimum percentage test or the ratio test described therein is satisfied.

1.401(a)(4)-6(b)(2)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Line C – Nondiscriminatory Employee-Provided Benefits

Employee-Provided benefits must satisfy 401(a)(4)

The plan must separately satisfy section 401(a)(4) with respect to the amount of employee-provided benefits.

Generally, the plan will satisfy this requirement if the contributions are made at the same rate, as a percentage of compensation, by all employees under the plan.

This requirement is also satisfied if the total of employer-provided and employee-provided benefits satisfies the nondiscrimination in amount requirement.

Finally, if the employer is using the grandfather rule, this requirement will be satisfied if the employer demonstrates that the benefits provided on account of employee contributions at lower levels of compensation are comparable to those provided at higher levels of compensation. This should be labeled Demo 11.

1.401(a)(4)-6(c)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part XIII – Nondiscriminatory Compensation, Line A – Definition of Compensation for Purposes of Computing Benefits

Requirement to use a nondiscriminatory definition of compensation

If a design-based safe harbor plan bases benefits or contributions on compensation, it must use a definition of compensation that is nondiscriminatory under section 1.414(s)-1 of the regulations. (The requirement to use a nondiscriminatory definition of compensation would also apply in the case of the definition of compensation that a section 401(k) or 401(m) plan must use in its actual deferral percentage (ADP) or actual contribution percentage (ACP) test.) The regulations contain certain definitions that are automatically nondiscriminatory under section 414(s).

Alternative definition of compensation

A plan may use an alternative definition, provided the definition is:

- reasonable,
- not designed to favor highly compensated employees, and
- if the facts and circumstances show that the average percentage of total compensation included for highly compensated employees as a group does not exceed the average percentage for nonhighly compensated employees by more than a de minimis amount.

In addition, under certain circumstances a plan may use:

- rate of compensation,
- imputed compensation, or
- prior-employer compensation under a definition of compensation that satisfies section 414(s).

Section 414(s) and the accompanying regulations provide specific definitions that satisfy section 414(s). One of the definitions is compensation within the meaning of section 415(c)(3). See Explanation #6 for the full definition of compensation under section 415 (including changes under prop. reg. 1.415(c)-2(e) and other changes that are no reflected in the following summary).

The following definitions of compensation automatically satisfy section 414(s):

1. 415(c)(3) definition

Compensation within the meaning of section 415(c)(3). This definition of compensation includes elective deferrals defined in section 402(g)(3) and amounts deferred under a section 125 cafeteria plan, section 132(f)(4), or under a section 457 plan. Under this definition, a

self-employed person's compensation is earned income as defined in section 401 (c) (2).

2. 3401 (a) Wages definition

Wages as defined in section 3401(a) plus all other compensation required to be reported by the employer under sections 6041, 6051 and 6052, or wages as defined in 3401(a), both determined without regard to any rules that limit wages based on the nature or location of employment.

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3. Safe-harbor definition

A safe-harbor definition that starts with 1 or 2, but excludes all of the following:

- reimbursements or other expense allowances,
- fringe benefits,
- moving expenses,
- deferred compensation, and
- welfare benefits.

This safe-harbor generally permits the following definition to fall within the scope of section 414(s):

- Regular or base salary or wages, plus
- commissions,
- tips,
- overtime and other premium pay,
- bonuses, and
- any other item of compensation includible in gross income not listed in the safe-harbor exclusions.

If this definition is used, any self-employed individual's compensation is to be limited to earned income multiplied by the percentage of nonhighly compensated employees' total compensation (determined on a group basis) that is included under the plan definition.

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Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Part XIII – Nondiscriminatory Compensation, Line A – Definition of Compensation for Purposes of Computing Benefits Line A – Definition of Compensation for Purposes of Computing Benefits, Continued

4. Election to include or exclude various items

Under any of these definitions, the employer can elect to include or exclude:

- elective contributions not includible in income,
- section 457(b) deferred compensation, and
- section 414(h)(2) pick-up contributions.

If any of these are included (excluded), they must all be included (excluded).

1.414(s)-1

When Demo 9 is required

If a determination is requested that a plan's definition of compensation is nondiscriminatory, then the applicant is required to submit a demonstration that, under the plan definition, the average percentage of total compensation included for highly compensated employees as a group does not exceed the average percentage for nonhighly compensated employees by more than a de minimis amount. (Self-employed individuals are not counted in either group.) Further information should be provided in accordance with the Instructions for Schedule Q as applicable to Demo 9.

Plan definition of compensation must be reasonable

The plan definition must also be reasonable and not designed to favor highly compensated employees. A definition is reasonable only if it is described in one of the four preceding numbered paragraphs and modified to exclude certain types of irregular or additional compensation or is limited to a dollar amount. For example, a plan's definition of compensation will not fail to satisfy section 414(s) merely because differential wage payments as defined in section 3401(h) are excluded from the plan's definition of compensation for purposes of determining benefits and contributions. (However, see below for rules allowing definitions of compensation that are based on rate of compensation or that include prior-employer compensation or imputed compensation.)

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Continued

Definition of total compensation	For this purpose, total compensation means compensation based on one of the definitions permissible under section 415(c)(3) (either including or excluding all elective contributions, etc.), limited to the amount described in section 401(a)(17). If the plan's alternative definition excludes amounts from the compensation of some (but not all) highly compensated employees, these amounts must also be excluded from the same employees' total compensation.
Certain Employees disregarded	The employer may elect to consider either all employees in the plan (other than self-employed individuals) or all employees (other than self-employed individuals) in all the plans that use the same alternative definition of compensation in performing this calculation. Employees who have no total compensation are disregarded for purposes of testing a definition of compensation.
De minimis difference	Whether the average percentage of total compensation included for highly compensated employees as a group exceeds the average percentage for nonhighly compensated employees by more than a de minimis amount is a question of facts and circumstances. The applicant should submit an explanation supporting a claim that such a difference is de minimis. This may include showing the difference for prior periods. Also, a difference that is more than de minimis may be disregarded if it is an isolated instance due to an extraordinary, unforeseeable event (such as overtime payments due to a major hurricane).
Cite – Alternative definition of compensation	**1.414(s)-1(d)**

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Continued

Rate of compensation

A plan can base allocations or benefits on employees' basic or regular rate of compensation using an:

- hourly pay scale,
- weekly salary, or
- similar unit of basic or regular compensation.

(Rate of compensation may not be used in a definition used for ADP or ACP testing in a section 401(k) or section 401(m) plan.)

A plan could also, for example, define compensation as basic or regular compensation, determined using a rate of compensation, plus irregular or additional compensation. The amount of basic or regular compensation must be determined using the rate of compensation as of a designated date or dates. Also, if the plan does not use the same date to determine employees' rates of compensation, the dates selected must be designed to determine such rates in a consistent manner. An employer may continue to credit an employee who has ceased performing services with compensation based on a rate of compensation for up to 31 days after the event causing the cessation.

Prior-employer compensation and imputed compensation

A defined benefit plan can include imputed compensation or prior-employer compensation in an alternative definition of compensation. Prior-employer compensation is compensation from another employer credited for periods prior to the employee's employment with the employer. Imputed compensation is compensation credited for periods after commencement of participation in the plan while the employee receives no compensation or reduced compensation because no services or reduced services are performed for the employer. Included in this definition of imputed compensation would be compensation credited while the employee is performing services for a joint venture.

Continued on next page

Alert No. 5A: Coverage And Nondiscrimination Requirements: DB Plans
Continued

Requirements for including prior-employer or imputed compensation in plan's definition of compensation

If the employer is including prior-employer or imputed compensation in the plan's definition of compensation,

- the provisions must apply to all similarly situated employees,
- there must be a legitimate business purpose for crediting the service, and
- the provisions must not by design or operation significantly favor highly compensated employees.

A definition of compensation that credits prior-employer compensation or imputed compensation must actually be used to calculate benefits under the plan.

Rate of pay

If the definition of compensation includes rate of pay, the definition must be demonstrated to be nondiscriminatory. If the definition includes prior-employer or imputed compensation, it must also be shown to be nondiscriminatory unless the definition is otherwise one of the safe harbor definitions.

Adjustments to testing method

If the employer is providing a demonstration with respect to a definition that includes rate of compensation, imputed compensation, or prior-employer compensation, the following adjustments apply to the testing method:

1. Compensation treated as include under the alternative definition (the numerator in the test), may not exceed 100 percent of total compensation.

2. Total compensation (the denominator in the test) must include all elective contributions and deferred compensation that could otherwise be disregarded and may not include prior-employer or imputed compensation.

Continued on next page

Rate of Compensation, prior employer and imputed compensation – Cites	**1.414(s)-1(e)and (f)**

Line B – Self-Employed Individuals

Overview of Compensation for self-employed individual	If the plan is using a definition of compensation permissible under section 415(c)(3), then it must define compensation for any self employed individual as earned income within the meaning of section 401(c)(2).
Equivalent Alternative Definition	If the plan is using the alternative safe harbor definition that excludes certain expenses and other items or an alternative definition that requires a demonstration, then the terms of the plan must provide for an equivalent alternative definition for self-employed individuals, determined as follows.
Calculation of earned income for self-employed individuals	The self-employed individual's earned income (increased by elective contributions, if any of these are included in the plan's alternative definition) is multiplied by the percentage of total compensation (including elective contributions, if any of these are included in the plan's alternative definition) that is included for the group of nonhighly compensated common-law employees. (This calculation is to be performed consistent with the rules for determining whether an alternative definition of compensation is nondiscriminatory, except that highly compensated common-law employees are disregarded.) The plan's alternative definition may also limit the compensation of some or all self-employed individuals who are also highly compensated employees to a portion of the equivalent compensation.
Line B - Cite	**1.414(s)-1(g)**

Employee Benefit Plan
Defined Benefit Plans Coverage and Nondiscrimination Requirements
(Worksheet Number 5A – Determination of Qualification)

INSTRUCTIONS – All items must be completed. A "Yes" answer generally indicates a favorable conclusion is warranted while a "No" answer indicates a problem exists. Please use the space on the worksheet to explain any "No" answer. If the employer has not requested a determination letter as to a particular item, the question related to that item should be answered "N/A." See Explanation Number 5A for guidance in completing this form.

The technical principles in this worksheet may be changed by future regulations or guidelines

Name of Plan

I.	**General Requirements**	**Plan Reference**	**Yes**	**No**	**N/A**
	Does the application include Schedule Q (Form 5300) and required attachments? [0530]				
II.	**Qualified Separate Lines of Business (QSLOB)**	**Plan Reference**	**Yes**	**No**	**N/A**
	a. Does the plan satisfy the nondiscriminatory classification gateway requirement on an employer-wide basis? [0531]				
	b. If the coverage of minimum participation requirements are applied on an employer-wide basis (in the case of an employer-wide plan), does the plan satisfy the special testing rule? [0532]				
III.	**Additional Participation Requirements**	**Plan Reference**	**Yes**	**No**	**N/A**
	a. Does the plan satisfy the minimum participation test under section 401(a) (26)? [0533]				
	b. Does the plan satisfy the minimum participation test under section 401(a)(26) with respect to former employees? [0534]				
	c. Does the plan's prior benefit structure satisfy section 401(a)(26)? [0535]				
IV.	**Disaggregation, Permissive Aggregation, and Restructuring**	**Plan Reference**	**Yes**	**No**	**N/A**
	a. Has the employer provided the required demonstration pertaining to aggregation, disaggregation, and restructuring? [0536]				
	b. Has the employer provided required information separately with respect to each separate disaggregated plan, permissively aggregated plan, or restructured component plan? [0537]				
V.	**Coverage**	**Plan Reference**	**Yes**	**No**	**N/A**
	a. Does the plan satisfy the ratio percentage test or one of the special requirements of 1.410(b)-2(b)(5),(6), or (7)? [0538] (If the answer is "Yes," skip to line "b")				

V.	Coverage – Continued	Plan Reference	Yes	No	N/A
	b. If the employer has requested a determination that the plan satisfies the average benefit test, does the plan satisfy: [0540]				
	(i) the nondiscriminatory classification test, and				
	(ii) the average benefit percentage test?				
	c. Does the plan satisfy coverage with respect to former employees?				
VI.	**Benefits, Rights, and Features (BRFs)**	**Plan Reference**	**Yes**	**No**	**N/A**
	a. Has the employer requested a determination regarding current availability of BRFs?				
	b. Has the employer specified each BRF for which a determination is requested? [0544]				
	c. Has the employer demonstrated that the current availability requirement is satisfied for each specific BRF for which a determination is requested? [0545]				
VII.	**Past Service and Service-Crediting**	**Plan Reference**	**Yes**	**No**	**N/A**
	a. Has the employer established that the plan credits service in a nondiscriminatory manner? [0546]				
	b. Has the employer established that the timing of the plan amendment providing a period of past service does not significantly discriminate in favor of the highly compensated employees? [0547]				
VIII.	**Other Nondiscrimination Requirements**	**Plan Reference**	**Yes**	**No**	**N/A**
	a. Do the plan's provisions restrict benefits and distributions in accordance with the regulations[0548, 0549, 0550]				
	b. Is the manner in which employees vest in their benefits under the plan nondiscriminatory? [0551]				
	c. Is the plan nondiscriminatory with respect to former employees:				
	i. with regard to the amounts of contributions or benefits? [0552]				
	ii. with regard to the availability of benefits, rights, and features? [0553]				

IX.	**Floor-Offset Safe Harbor Testing**	**Plan Reference**	**Yes**	**No**	**N/A**
	Is the plan part of a floor-offset arrangement?[] (If "Yes," refer to explanations before completing the remainder of the worksheet.) [0554]				
X.	**Nondiscriminatory Contribution or Benefits**	**Plan Reference**	**Yes**	**No**	**N/A**
	a. Has the employer indicated that the plan is intended to satisfy a design-based safe harbor?[] If "Yes," skip to Part XI; if "No," continue with line b.)				
	b. If the employer has requested a determination regarding a general test, has the employer demonstrated that the test is satisfied? [0555]				
	c. If the employer has requested a determination regarding a nondesign-based safe harbor, has the employer demonstrated that the plan satisfies the alternative safe harbor for flat benefit plans? [0556]				
XI.	**Design-Based Safe Harbors**	**Plan Reference**	**Yes**	**No**	**N/A**
	a. Does the plan satisfy the uniformity requirements and one of the following safe harbors: [0557]				
	i. unit credit safe harbor; [0558]				
	ii. fractional rule unit credit safe harbor; [0559]				
	iii. fractional rule flat benefit safe harbor;[0560]				
	iv. insurance contract plan safe harbor; or [0561]				
	v. cash balance plan safe harbor? [0562]				
	b. Does the plan satisfy the fresh-start requirements? [0563]				
XII.	**Employee Contribution Not Allocated To Separate Accounts**	**Plan Reference**	**Yes**	**No**	**N/A**
	a. If this is a contributory plan, would the plan satisfy a safe harbor on the basis of employer-provided benefit rates? [0564]				
	b. If the employer-provided benefit is determined under the composition-of-workforce method, has the employer demonstrated that the requirements are satisfied? [0565]				
	c. Is the employee-provided benefit nondiscriminatory in amount? [0566]				

XIII.	Nondiscriminatory Compensation	Plan Reference	Yes	No	N/A
	a. Does this design-based safe harbor plan use a nondiscriminatory definition of compensation for purposes of computing benefits? [0567]				
	b. In the case of a plan that covers self-employed individuals, does the plan define compensation for these individuals in a manner that satisfies section 414(s)? [0568]				

Form 9640 June 2012	Department of Treasury – Internal Revenue Service **Employee Plans Deficiency Checksheet** **Attachment Number 5A** **Coverage and Nondiscrimination Requirements** **Defined Benefit**	Date

For IRS Use	Please furnish the amendment(s) requested in the section(s) checked
0530 I.	Please submit a completed Schedule Q (Form 5300), including all required attachments
0531 II.a.	Please submit the demonstration that the plan satisfies the nondiscriminatory classification requirement on an employer-wide basis. IRC section 410(b) (5) (B) and Regs. section 1.414(r)-8(b) (2).
0532 II.b.	Please submit the demonstration that the plan satisfies the special testing rule for employer-wide plans where the requirements of section 410(b) or section 401(a) (26) of the Code are applied on an employer-wide basis. Regs. sections 1.414(r)-1 (c) (2) (ii) and 1.414(r)-1 (c) (3) (ii).
0533 III.a..	Please submit the demonstration that the plan satisfies the participation requirements of section 401(a)(26) with respect to employees. IRC section 401(a)(26) and Regs.sections 1.401 (a) (26)-1 through 1.401(a)(26)-9 .
0534 III.b..	Please submit the demonstration that the plan satisfies the participation requirements of section 401(a) (26) with respect to former employees. IRC section 401(a) (26) and Regs. section 1.401 (a) (26)-4.
0535 III.c.	Please submit the demonstration that the plan satisfies the participation requirements of section 401(a) (26) with respect to its prior benefit structure. IRC section 401(a)(26) and Regs. section 1.401 (a) (26)-3.
0536 IV.a..	Please submit the information required by the instructions for Schedule Q (Form 5300) regarding plans that are disaggregated, permissively aggregated, or restructure
0537 IV.b.	Your application requests a determination regarding the plan being (a) permissively aggregated with another plan, (b) mandatorily disaggregated, or (c) restructured into component plans. Therefore, you must submit information concerning coverage and nondiscrimination on the basis of the aggregated plan, if applicable, or separately with respect to the separate disaggregated plans or restructured component plans. Please submit this information in accordance with the instructions for Schedule Q (Form 5300). Regs. sections 1.410(b)-7 and 1.401(a)(4)-1(c)(4).

0538 V.a..	Please submit the information that demonstrates the plan satisfies the "ratio percentage test" described in section 410(b) (1) (B) of the Code with respect to employees. Alternatively, please tell us if you would like our determination to take into account whether the plan satisfies the average benefit test in section 410(b)(2) of the Code. If so, submit a demonstration that the plan satisfies this test. Refer to the guidelines concerning a demonstration of the average benefit test in the instructions for Schedule Q (Form 5300) . IRC sections 410(b) (1) and 7701 (a) (46), and Regs. sections 1.410(b)-2 through 1.410(b)-10
0540 V.b.	Please submit a demonstration that the plan satisfies the average benefit test in section 410(b) (2) of the Code. Refer to the guidelines concerning a demonstration of the average benefit test in the instructions for Schedule Q (Form 5300). IRC section 410(b)(2).
0541 V.b.(i)	Please submit a demonstration that the plan satisfies the nondiscriminatory classification test described in section 1.410(b)-4 of the regulations. IRC section 410(b) (2) (A) (i) and Regs. section 1.410(b)-2(b) (3).
0542 V.b.(ii).	Please submit a demonstration that the plan satisfies the average benefit percentage test described in section 1.410(b)-5 of the regulations. Refer to the guidelines concerning a demonstration of the average benefit test in the instructions for Schedule Q (Form 5300). IRC section 410(b) (2) (A) (ii) and Regs. section 1.410(b)-2(b)(3).
0543 V.c.	Submit a demonstration that the plan satisfies the minimum coverage requirements of section 410(b) of the Code with respect to former employees. IRC section 410(b)(1) and Regs. section 1.410(b)-2(c).
0544 VI.b..	You have requested a determination of whether benefits, rights, or features satisfy the nondiscriminatory current availability requirement under section 1.401(a) (4)-4(b) of the regulations. Please identify each specific benefit, right, or feature you wish considered. See the guidelines pertaining to this demonstration in the instructions for Schedule Q (Form 5300). Regs. section 1.401(a)(4)-4(b).
0545 VI.c.	Please submit a demonstration that the benefit, right, or feature described in section _____ of the plan meets the nondiscriminatory current availability requirement under section 1.401(a)(4)-4(b) of the regulations. See the guidelines pertaining to this demonstration in the instructions for Schedule Q (Form 5300). Regs. Section 1.401(a)(4)-4(b)
0546 VII.a.	Please submit a demonstration in accordance with the instructions for Schedule Q (Form 5300) that the timing of the grant of past service credit provided in section of the plan does not have the effect of discriminating significantly in favor of highly compensated employees. Alternatively, this section _____ of the plan should be amended so that the grant of past service conforms to the safe harbor described in section 1.401(a) (4)-5(a) (3) of the regulations. Regs. section 1.401 (a)(4)-5(a).

0547 VII.b.	Please submit a demonstration in accordance with the instructions for Schedule Q (Form 5300) that the manner in which service is credited under section _____ of the plan is nondiscriminatory. Regs. section 1.401(a)(4)-11(d).
0548, 0549. 0550 VIII.a.	Section of the plan should be amended to provide that in the event of termination of the plan the benefit of any active or former highly compensated employee will be limited to a benefit that is nondiscriminatory under section 401(a)(4) of the Code. This section of the plan should also be amended to provide that except in the circumstances described in the next sentence distributions to the 25 most highly compensated active and former highly compensated employees will be restricted to an amount no greater than the amount that would be paid to the individual under a straight life annuity that is the actuarial equivalent of the employee's accrued benefit and the employee's other benefits under the plan (other than a social security supplement), plus any social security supplement the employee is entitled to receive. This restriction does not apply if: (a) after payment of the benefit to the restricted employee, the value of plan assets equals or exceeds 110 percent of the value of current liabilities as defined in section 412(l)(7), (b) the value of the benefits for the restricted employee is less than 1 percent of the value of current liabilities before distribution, or (c) the value of the restricted employee's benefits does not exceed $5,000. Further, the plan may provide that distribution of restricted amounts may be made provided the terms of the plan require adequate security to guarantee repayment of the restricted amount upon plan termination. Regs. section 1.401(a)(4)-5(b) and Rev. Rul. 92-76, 1992-38 I.R.B.
0551 VIII.b..	Section _____ of the plan should be amended so that the manner in which employees vests in their benefits under the plan is nondiscriminatory. Regs. section 1.401(a)(4)-11(c).
0552 VIII.c.(i)	Please submit a demonstration that the plan is nondiscriminatory with respect to the amount of contributions or benefits provided to former employees. Regs. section 1.401(a)(4)-10(b)
0553 VIII.c.(ii)	Please demonstrate, with respect to section _____ of the plan, that the plan satisfies the requirement that it be nondiscriminatory with respect to the availability of benefits, rights, or features provided to former employees. Regs. section 1.401(a)(4)-10(c).
0554 IX.	Please indicate whether this plan is part of a floor-offset arrangement intended to satisfy the requirements of section 1.401(a)(4)-8(d) of the regulations. If so, please submit the information required by Schedule Q (Form 5300). Regs. section 1.401(a)(4)-8(d).
0555 X.b.	Please submit a demonstration that the plan satisfies a general test for nondiscrimination in the amounts of contributions or benefits under the plan. Refer to the guidelines concerning a demonstration of a general test in the instructions for Schedule Q (Form 5300). IRC section 401(a)(4) and Regs. sections 1.401(a)(4)-2(c), 1.401(a)(4)-3(c), 1.401(a)(4)-8(b)(2), 1.401(a)(4)-8(c)(2), and 1.401(a)(4)-8(c)(3) (iii)(C).

0556 X.b.	Please submit a demonstration that the plan satisfies the alternative safe harbor for flat benefit plans. Refer to the guidelines concerning a demonstration of this safe harbor in the instructions for Schedule Q (Form 5300).IRC section 401(a) (4) and Regs. Section 1.401(a)(4)-3(b) (4)(i)(C)(3).
0557 XI.a.	Section _____ of the plan should be amended to satisfy the uniformity requirements that apply to safe harbor plans under section 1.401(a)(4)-3(b)(2) of the regulations. IRC section 401(a)(4) and Regs. Section 1.401(a)(4)-3(b)(2).
0558 XI.a.(i).	Section _____ of the plan should be amended to satisfy the safe harbor for unit credit plans described in section 1.401(a)(4)-3(b)(3) of the regulations. IRC section 401(a) (4) and Regs. section 1.401(a)(4)-3(b)(3).
0559 XI.a. (ii).	Section of the plan should be amended to satisfy the fractional rule unit credit plan safe harbor described in section 1.401(a)(4)-3(b)(4)(i)(C)(1) of the regulations. IRC section 401(a)(4) and Regs. section 1.401(a)(4)-3(b)(4)(i)(C)(1).
0560 XI.a. (iii)	Section _____ of the plan should be amended to satisfy the fractional rule flat benefit plan safe harbor described in section 1.401(a)(4)-3(b)(4)(i)(C)(2) of the regulations. IRC section 401(a)(4) and Regs. section 1.401(a)(4)-3(b) (4)(i)(C)(2).
0561 XI.a.(iv)	Section _____ of the plan should be amended to satisfy the insurance contract plan safe harbor described in section 1.401(a)(4)-(b)(5) of the regulations. IRC section 401(a)(4) and Regs. section 1.401(a)(4)(b)(5).
0562 XI.a.(v)	Section _____ of the plan should be amended to satisfy the cash balance plan safe harbor described in section 1.401(a)(4)-8(c)(3)(iii)(B) of the regulations. IRC Section 401(a)(4)and Regs. section 1.401(a)(4)-8(c) (3)(iii)(B).
0563 XI.b.	To meet the safe harbor requirement of section 1.401(a)(4)-3(b)(6)(vii) of the regulations, the plan should be amended to satisfy the fresh-start requirements of section 1.401(a)(4)-13(c) . Regs sections 1.401 (a)(4)-3(b)(6) (vii) and 1.401(a)(4)-13(c).
0564 XII.a.	A contributory defined benefit plan will not satisfy a safe harbor unless it would do so if the plan's benefit formula provided benefits at employer-provided benefit rates determined under section 1.401(a)(4)-6(b) of the regulations. Please submit a demonstration that this requirement is satisfied. Alternatively, section _____ of the plan may be amended to satisfy this requirement. Regs. section 1.401(a)(4)-3(B)(6)(viii).
0565 XII.b.	Please submit a demonstration that the plan satisfies the requirements of the composition-of-workforce method for determining the employer-provided benefit in section 1.401(a) (4)-6(b)(2) of the regulations.
0566 XII.c.	Please submit a demonstration that benefits provided on account of employee contributions at lower levels of compensation are comparable to those provided on account of employee contributions at higher levels of compensation. Regs. section 1.401(a)(4)-6(c (4)(ii)(D)

0567 XIII.a.	The definition of compensation contained in section _____ of the plan should be amended to conform to one of the definitions described in sections 1.414(s)-1(c)(2) and 1.414(s)-1(c)(3) of the regulations. Alternatively, submit a demonstration that the plan's definition of compensation is nondiscriminatory. IRC section 414(s) and Regs. section 1.414(s)-1 .
0568 XIII.b.	Section _____ of the plan should be amended to define compensation for self-employed individuals in the manner described in section 1.414(s)-1(g)(1) of the regulations. IRC section 414(s) and Regs. section 1.414 (s)-1(g) (1).